Supreme Court, U.S.
FILED

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No. ____
October Term, 1997

In the
Supreme Court
of the
United States of America

Mel Jenkins, Petitioner

v.

Florida Keys Community College, et al., Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Petition for Writ of Certiorari

Appendix

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11488

Appendix

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In The
United States District Court
Southern District of Florida

Case No. [not yet assigned]

Mel Jenkins, Plaintiff,

vs.

Florida Keys Community College Board of Trustees, Patricia Almeda, B.G. Carter, Aaron Castillo, Mona Clark, William Daniels, Stephanie Monsalvatge, Dale wolgast, William Seeker, William Eldridge, Maureen Crowley, Nelson Read, Greg O'Berry, Robert Norton, Rodolfo Gomez, Jeffrey Goody, and William DeVane, Defendants.

Initial Pleading

and

Complaint

Statement of Case

1. In February of 1993, William Seeker (hereinafter 'president') of Florida Keys Community College, an agency of the State of Florida, located in Monroe County Florida, made a recommendation to the Florida Keys Community College District Board of Trustees (hereinafter 'FKCC' or 'board' or 'college board') that Mel Jenkins (hereinafter 'the teacher') have his employment contract terminated. The essential charges brought against the teacher by the president, were that he falsified his academic credentials, was rude, sarcastic, and belittling to his students, and failed to pursue a bachelors degree after being ordered to due so. The teacher requested an administrative hearing pursuant to section 120.57 F.S. (Florida Statutes), and the Rule 6A-14.0411(4) F.A.C. (Florida Administrative Code).

2. The college board selected a hearing officer and the hearing to consider the charges was held on July 29, 1993.

During and subsequent to the hearing various memoranda and pleadings were submitted by the parties. In September of 1993 the hearing officer served a recommended order on the college board, teacher, and president.

3. At a special meeting on November 2, 1993, the college board approved a final order which terminated the teacher's employment with FKCC.

4. The teacher served a notice of appeal of this final order to the District Court of Appeal, Third District of Florida (hereinafter '3rd DCA') on November 29, 1993, pursuant to section §120.68. Various memoranda and pleadings were submitted by the parties to the 3rd DCA, and the court filed a per curiam affirmance of the FKCC final order on October 5, 1994, and issued a mandate on December 30, 1994 (hereinafter 'appeal proceeding').

5. Florida law precludes Supreme Court appeals of per curiam affirmances by their Court of Appeals, and so we here plead for the United States District Court to accept jurisdiction in this civil action to secure redress for injuries to the teacher related to his termination and the appeal proceedings, as outlined below.

6. FKCC, and each individual trustee (hereinafter 'board members') during the administrative proceeding conducted by FKCC, in which the teacher's employment was terminated (hereinafter 'termination proceeding'), including Ms. Stephanie Monsalvatge, Mr. Daniels, Mr. Carter, Mr. Castillo, Mr. Wolgast, Ms. Almeda, Mr Clark, and several of the FKCC officers and agents, including William Seeker (hereinafter 'president'), William Eldridge (hereinafter 'dean of faculty'), Maureen Crowley (hereinafter 'dean of students'), Nelson Read (hereinafter 'dean of business' or 'general counsel'), Stephanie Monsalvatge (hereinafater 'hearing officer' or 'chairman of the board'), Greg O'Berry (hereinafter 'division chairman'), Robert Norton (hereinafter 'president's attorney' or 'attorney for the president'), Rodolfo Gomez, Jeffrey Goody, William DeVane (hereinafter 'attorney for the board' or 'board attorney'), and the Florida Third District Court of Appeal, did under color of Florida State statute, regulation, custom, and usage, subject the teacher, or cause him to be subjected to, the deprivation of his rights, privileges, and immunities secured by the Constitution and laws of the United States.

7. More specifically, the aforesaid FKCC, board members, officers and agents, deprived the teacher of his property

and liberty without due process of law in contravention to the 5th and 14th Amendment to the U.S. Constitution, denied the teacher equal protection of the laws in contravention to the 14th Amendment to the U.S. Constitution, and in contravention to the 6th Amendment to the U.S. Constitution, deprived the teacher of his right to a trial by an impartial jury, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

8. In so doing, the above parties did under color of Florida State statute, regulation, and custom, deprive the teacher of his rights, privileges, and immunities secured by the U.S. Constitution and laws, as well as in contravention to the State of Florida Constitution Article 1 Sections 2, 4, 9, 21, and 22, and the aforesaid are therefore liable to the teacher in an action at law, suit in equity, or other proper proceeding for redress pursuant to 42 U.S.C. §1983 and §240.319(c) F.S.

9. The board members, board attorney, president, hearing officer, dean of faculty, dean of students, dean of business, and division chairman, did so violate the laws of the United States when they:

10. acted to or colluded in the termination of the teacher for pretextual retaliatory reasons, inextricably linked to the teacher's expression of his critical opinion of the Monroe County Superintendent of Schools and his policies, to two Monroe County School administrators;

11. acted to or colluded to further the termination of the teacher for reasons inextricably linked to the teacher's expression of his opinions regarding rude, sarcastic, and belittling behavior as a teaching methodology;

12. acted to or colluded to further the termination for pretextual retaliatory reasons, inextricably linked to the nature of teacher's exercise of free and protected speech;

13. were substantially and materially motivated by malice in their actions to further the termination of the teacher;

14. were substantially and materially motivated by bad faith in their actions to further the termination proceeding;

15. defamed the teacher as a result of the termination proceeding;

16. damaged the teacher's reputation, standing, and associations in the community;

17. conducted ex parte communications between themselves during the termination proceeding;

18. The board members, president, dean of faculty, dean of students, and division chairman, did so violate the laws of the United States when they:

19. prohibited the teacher from making any statements publicly which could be construed as having political implications;

20. prohibited the teacher from involving the college in possibly controversial political subjects;

21. failed to warn the teacher his job performance was unsatisfactory and may result in his termination if it wasn't corrected.

22. FKCC and the board members, did so violate the laws of the United States when they:

23. exceeded their jurisdiction by failing to render a final order terminating the teacher within 90 days of the administrative hearing in the termination proceeding;

24. applied an incorrect burden of proof in formulating their final order in the termination proceeding, using preponderance of evidence rather than clear and convincing evidence;

25. founded their final order terminating the teacher, in substantial and material part on prejudicial hearsay evidence they deemed to be fact;

26. rendered their final order terminating the teacher, in a room which was not normally open to the public;

27. rendered a discrete and material decision composing part of their final order terminating the teacher, which was adverse to the teacher, but which was voted on by less than a majority of the full membership of the board;

28. failed to provide the teacher an opportunity to present oral argument to the college board regarding his termination;

29. failed to include all required documents into the record of the termination proceeding;

30. falsified that they had read the complete and current record of the termination proceeding;

31. failed to consider the entire record of the termination proceeding;

32. failed to consider motions and requests submitted by the teacher in the termination proceeding;

33. failed to recuse themselves for bias, prejudice, or interest in the termination proceeding;

34. received and considered post-hearing memoranda submitted beyond the allowable period, from the president and the board attorney, in the termination proceeding;

35. failed to render a final order terminating the teacher, which included a ruling on each of the proposed findings;

36. received a recommended order for the termination of the teacher, from a member of the college board;

37. failed to render a final order terminating the teacher, which addressed the teacher's exceptions to the hearing officer's recommended order;

38. failed to render a final order terminating the teacher, which reasonably responded to each application or request of the teacher;

39. failed to render a final order terminating the teacher, to which was attached a copy of the complete text of all materials incorporated by reference into the final order;

40. failed to render a final order terminating the teacher, which provides sufficient references to sources in the record for finding competent substantial evidence to support their findings;

41. failed to render a final order terminating the teacher, which stated with particularity the reasons for their findings;

42. failed to render a final order terminating the teacher, which included a separate statement of all the relevant and material issues presented in the case;

43. failed to render a final order terminating the teacher, which addressed all countervailing arguments developed in the record;

44. failed to render a final order terminating the teacher, which was sufficiently expositive;

45. arbitrarily and capriciously rendered a final order terminating the teacher which contains logically irreconcilable findings;

46. terminated the teacher primarily for reasons unrelated to his job performance;

47. terminated the teacher for reasons that are trivial, unsupported by the facts, and unrelated to the educational process or his working relationships;

48. based the teacher's salary in substantial part on non-objective factors;

49. based the teacher's salary in substantial part on factors which were irrelevant to his job performance;

50. paid the teacher less than other instructors who did the same work, without equitable reason therefor;

51. failed to explicate its policy regarding rude, sarcastic, belittling, or disrespectful behavior on the part of teachers, before they invoked this policy to terminate the teacher;

52. materially failed to follow the required rulemaking procedures, in which the teacher had a substantial interest;

53. failed to provide citations to rules which they adopted, and in which the teacher had a substantial interest;

54. adopted rules which enlarge, modify, and contravene the specific provisions of law, in which the teacher had a substantial interest;

55. adopted rules which are vague, in which the teacher had a substantial interest;

56. adopted rules which fail to establish adequate standards of agency decisions, in which the teacher had a substantial interest;

57. adopted rules which vest unbridled discretion in the agency, in areas in which the teacher had a substantial interest;

58. exceeded its grant of rulemaking authority, in areas in which the teacher had a substantial interest; and

59. adopted rules which are arbitrary and capricious, in areas in which the teacher had a substantial interest.

60. FKCC, the board members, and the president, did so violate the laws of the United States when they:

61. failed to offer the teacher a contract for the 1993-1994 academic year;

62. refused to comply with the teacher's request to be provided an agenda to and notified of FKCC board meetings;

63. refused the teacher access to the record of the termination proceeding;

64. failed to exercise due diligence in notifying the teacher of the final order by which he was terminated, and of his appeal rights thereto;

65. refused the teacher access to public information identifying when the final order was rendered in the termination proceeding;

66. refused the teacher access to public information identifying who was serving as the clerk in the termination proceeding and where this clerk is located;

67. refused the teacher access to the college rules;

68. refused the teacher access to the college rules in non-print and electronic form;

69. refused the teacher access to his personnel files;

70. failed to exercise due diligence in assessing the teacher's academic credentials prior to his initial employment;

71. failed to exercise due diligence in assessing the teacher's academic credentials prior to granting him tenure more than three years after he was initially hired;

72. failed to exercise due diligence in terminating the teacher for reasons related to his academic credentials;

73. made arbitrary and capricious employment decisions which injured the teacher;

74. created rules that set undue, restrictive, and extraordinary standards that act as deterrents for persons to enter the college teaching profession, and by actions, the result or effect of which tends to create or maintain a situation which impinges upon the competitive market place.

75. FKCC and the dean of faculty, did so violate the laws of the United States when they:

76. for impermissible reasons conducted a "fishing expedition" to secure information used to terminate the teacher;

77. prohibited the teacher from attending public meetings and entering public property in the public trust of FKCC;

78. summarily banned the teacher without cause, from entering public property entrusted to FKCC, without an immediate hearing;

79. canceled all of the teacher's classes and failed to schedule subsequent classes for him;

80. seized property of the teacher;

81. withheld the teacher's paychecks;

82. discontinued the teacher's campus phone service;

83. withheld the teacher's mail;

84. failed to notify the teacher of his committee meetings, of college-wide and division planning conferences, and of college social gatherings;

85. obstructed the teacher from performing his official and required faculty duties;

86. suspended the teacher prior to the termination proceeding;

87. failed to provide the teacher with an immediate suspension hearing upon his suspension, to determine if there is cause to warrant his immediate suspension, prior to a hearing to consider the termination charges;

88. prejudicially treated the teacher in a way that was substantially different than any other teacher at the college;

89. refused the teacher access to his personnel files;

90. refused to allow the teacher access to public records;

91. failed to allow the teacher to examine the specific charges against him;

92. failed to inform the teacher as to who made charges against him;

93. failed to allow the teacher an opportunity to impeach those who brought charges against him;

94. failed to provide the teacher an opportunity to correct the alleged deficiencies which resulted in the termination proceeding and his consequent termination;

95. unfairly prejudiced the teacher's defense against the charges arising during the termination proceeding.

96. The president did so violate the laws of the United States when he:

97. falsified or colluded in the falsification of sworn affidavits submitted into the record of the termination proceeding;

98. falsified or colluded in the falsification of sworn affidavits submitted into the record of the appeal proceeding before the Florida Third District Court, Miami, Florida, *Mel Jenkins vs. Florida Keys Community College;*

99. falsified or colluded in the falsification of documents submitted to the Southern Association of Colleges and Schools (hereinafter 'SACS') regarding the academic credentials of some of FKCC's teachers;

100. The hearing officer did so violate the laws of the United States when she:

101. failed to read and consider the complete record in formulating her recommended order in the termination proceeding;

102. falsely swore that she had read the complete record of the termination proceeding;

103. conducted a pro forma hearing in the termination proceeding;

104. failed to recuse herself for bias, prejudice, or interest in the termination proceeding;

105. conducted the hearing of the termination proceeding in a room which was not normally open to the public;

106. failed to approve or disapprove the withdrawal of the teacher's attorney in the termination proceeding;

107. failed to postpone the hearing in the termination proceeding, upon learning that teacher's attorney had recently withdrawn;

108. denied the teacher's request to postpone the hearing in the termination proceeding;

109. denied the teacher's request to provide him with legal counsel in the termination proceeding;

110. refused the teacher access to the transcript of the termination proceeding;

111. failed to give the teacher constructive notice of an opportunity to submit proposed findings in the termination proceeding;

112. failed to allow the teacher a fair opportunity to submit proposed findings in the termination proceeding;

113. applied an incorrect burden of proof in formulating a recommended order to terminate the teacher, using preponderance of evidence rather than clear and convincing evidence;

114. filed a recommended order in the termination proceeding which deemed to be fact, hearsay evidence prejudicial to the teacher;

115. gave undue deference to the testimony of the dean of faculty and dean of students;

116. arbitrarily and capriciously filed a recommended order in the termination proceeding, which contains logically irreconcilable findings.

117. FKCC, and the hearing officer, did so violate the laws of the United States when they:

118. failed to respond to the teacher's request that a complete record be provided to the board for consideration of their final order;

119. failed to respond to the teacher's objection to the FKCC board attorney directing the board to consider an incomplete portion of the record in formulating the final order which terminated the teacher;

120. failed to respond to the teacher's objection to FKCC board attorney misinforming the board members regarding their obligations to read the record;

121. failed to respond to the teacher's objection to the president's attorney, and the FKCC board and hearing officer's attorneys, directing the board to consider and weigh hearsay evidence in formulating the final order;

122. failed to respond to the teacher's objection to the submission of briefs from the president's attorney and FKCC board and hearing officer's attorneys, filed beyond the expressly provided post-hearing memoranda period, and without prior notice to the teacher;

123. failed to respond to the teacher's request to have normal customary access to the college campus;

124. failed to respond to the teacher's request to have all his mail delivered unto him;

125. failed to respond to the teacher's request that the charges against him be dismissed;

126. The board attorney did so violate the laws of the United States and ethics of the Florida and Federal bar when he:

127. prejudiced the proceeding by taking sides and lending his weight to the prosecution, posing as a neutral and impartial advisor to the college board and hearing officer, while at the same time advocating on the merits in favor of the president and prosecution against the teacher;

128. conducted ex parte communications during the termination proceeding;

129. prejudiced the teacher by misinforming the college board regarding the proper procedure in the termination proceeding;

130. prejudiced the teacher by misinforming the college board that they could not overrule any findings of fact, unless they state on the record that they have read the 'transcript' in its entirety;

131. prejudiced the teacher by failing to properly advise the board in how to maintain impartiality and neutrality in the proceeding which terminated the teacher;

132. prejudiced the teacher by cui bono obiter dictum to the college board, which quashed the teacher's pleadings opposing actions of the board attorney, president, and hearing officer;

133. prejudiced the teacher by failing to withdraw from representing FKCC in area of law which he knew or should have known he was incompetent.

134. The president's attorney, in addition to attorneys Rodolfo Gomez and Jeffrey Goody, did so violate the laws of the United States and ethics of the Florida and Federal bar, when they:

135. falsified or colluded in the falsification of sworn affidavits submitted to the Florida Third District Court of Appeal during the appeal proceeding;

136. committed or solicited others to commit false swearing and intentional misrepresentation of court documents.

137. FKCC and the board members, did so violate laws of the United States when it did find and order that the teacher be terminated from his tenured teaching office because:

138. the teacher used sarcasm, rudeness, belittling, and disrespectful behavior toward students;

139. the teacher admitted that sarcasm, rudeness, and disrespectful behavior toward students were appropriate teaching tools;

140. the teacher was fully aware that over the last 3 years a number of students have withdrawn from the teacher's courses because of his rude, belittling and sarcastic behavior toward them;

141. the teacher has been advised to discontinue rude, belittling and sarcastic behavior toward students and refused to discontinue such behavior;

142. the teacher intentionally misrepresented his academic credentials;

143. the teacher falsified possession of an A.A. degree;

144. the teacher falsified his academic credentials on his job application;

145. the teacher admitted he claimed to possess an A.A. degree and that he did not attain an A.A. degree;

146. the teacher indicated on his job application the receipt of a C.D.P. degree, which he does not have;

147. the teacher falsified possession of an A.S. degree;

148. the teacher admitted he claimed to possess an A.S. degree, but he does not;

149. the teacher took credit for having the equivalent of an A.S. degree from a technical school, but he does not;

150. the teacher admitted he claimed to have an equivalent A.S. degree, but he does not;

151. the teacher admitted he concurred with the assessment the time he spent at the technical school was not equivalent to an A.S. degree;

152. the teacher should have known the work he completed at the technical school was not equivalent to an A.S. degree;

153. the teacher accepted credit for enrollment in a St. Leo college bachelor's degree program when seeking employment at the college, but he was not so enrolled;

154. the teacher claimed to be enrolled in St. Leo college at the time he was initially hired, and he was not so enrolled;

155. the college administrators relied on the teacher's false claims to have an A.A. degree, an equivalent A.S. degree, and being enrolled in St. Leo college when he was hired;

156. the teacher on his job application, executed an oath, providing that "falsification of any information submitted on the application shall be cause for rejection of application or dismissal after hire," he did falsify information submitted on the application with regards to his academic credentials, and therefore may be dismissed;

157. the teacher was ordered by the college administration to continue studies toward a baccalaureate degree, he admitted knowledge of this order, but he did not do so;

158. the teacher failed to comply with a condition of the contract between the teacher and the college board that he pursue a baccalaureate degree;

159. the teacher was employed at a level III pay grade based on having two degrees plus related work experience;

160. the teacher was employed at a level III pay grade, based on having two degrees plus related work experience, he did not possess these degrees claimed, and should not have been employed;

161. the teacher was paid for degrees he didn't have;

162. the teacher should not have been employed;

163. the teacher was selected over other job candidates as a result of his false representations of his academic credentials;

164. the teacher was selected over other candidates for his job because of he falsified possessing an A.A. degree, possessing an equivalent of an A.S. degree, and enrollment in a bachelor's degree program at St. Leo college;

165. the teacher was selected over other job candidates on *July of 1984* as a result of his false representations of his academic credentials;

166. those actions are each and every one, "good and sufficient reason" for his termination;

167. the teacher committed actions which are "good and sufficient reason" for his termination;

168. the teacher falsely claimed to have an A.A. degree, and the teacher took credit for having an equivalent A.S. degree from a technical school and knew, or should have known, it was not the equivalent of an A.S. degree, and that these two actions separately and by themselves, are "good and sufficient reason" to terminate the teacher;

169. the teacher falsely claimed to have an A.A. degree, and the teacher took credit for having an equivalent A.S. degree from a technical school and knew, or should have known, it was not the equivalent of an A.S. degree, and the two actions together and combined, are "good and sufficient reason" to terminate the teacher.

170. The Florida Third District Court of Appeal did so violate the laws of the United States when they:

171. failed to comply with the teacher's request for a jury trial;

172. deprived the teacher of his substantial and valuable property without an opportunity for a jury trial;

173. deprived the teacher of his liberty without an opportunity for a jury trial;

174. failed to set aside, modify, or remand the final order of FKCC which terminated the teacher, and provide the teacher relief from and remedies to actions arising from the termination proceeding which injured the teacher and were in violation of constitutional or statutory provisions;

175. failed to render an opinion on the FKCC final order terminating the teacher, which deals separately with disputed issues of agency procedure, interpretations of law, determinations of fact, or policy within the agency's exercise of delegated discretion;

176. failed to afford the teacher relief from insecurity and uncertainty regarding the legal relation to him, and validity of, Florida State statutes and regulations, when they were questioned or challenged by the teacher.

177. To redress and remedy the foregoing injuries to the teacher, we ask the U.S. District Court, Southern District of Florida and a jury of his peers, to:

178. award the teacher $1,000,000.00 in punitive damages, the burden of which is equally shared among the defendants: FKCC, the board members, William Seeker, William Eldridge, Maureen Crowley, Nelson Read, William DeVane, and Greg O'Berry;

179. order a sanction of $100,000.00 in punitive damages from each of the defendants: Robert Norton, Rodolfo Gomez, and Jeffrey Goody, to be divided between FKCC and the teacher, and also disbar them from practicing law before the United States District Court;

180. award attorney fees, court costs, and other compensatory damages to the teacher;

181. order that the teacher be reinstated immediately and receive back pay at Level IV salary for the time he has been terminated, and also receive the difference in pay between Level III and Level IV, from the period he was employed until he was terminated;

182. order classes to be rescheduled for the teacher, to commence no sooner than 2 years from the date of his reinstatement, to allow him to make up lost time for continuing research, development, and education in his academic field;

183. order a magistrate or special master to provide a hearing to determine, subject to Court review, any other steps

necessary to fully restore the teacher to his teaching position, including the return of his mail, office, and equipment assigned to him, and to fully restore his reputation and standing in the community, to the extent reasonably possible.

184. We cite as authority for this relief: the United States Constitution, including the Fifth, Sixth, and Fourteenth Amendments; United States Code, 42 U.S.C. §1983; the State of Florida Constitution, Article 1 §§2, 4, 9, 21, and 22; and Florida Statutes §§240.319(c), 120.68(13)(a); Cf. *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 2748 (1981); *Owen v. City of Independence*, 100 S.Ct. 1398 (1980); and *Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973).

Filed on January 13, 1995 at
Key West U.S. District Court

Mel Jenkins
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Key West, FL 33040

No. _____
October Term, 1997

In the
Supreme Court
of the
United States of America

Mel Jenkins, Petitioner

v.

Florida Keys Community College, et al., Respondents

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

Petition for Writ of Certiorari

Appendix
A

Mel Jenkins, *Pro Se*
PO Box 2525
Key West, FL 33045

95-10003.rra

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-10003 CIV HIGHSMITH

MEL JENKINS Plaintiff,

vs.

FLORIDA KEYS COMMUNITY COLLEGE
BOARD OF TRUSTEES, et al. Defendants.
_____/

REPORT AND RECOMMENDATION

This matter is before the Court upon the defendants' Motion to Dismiss (D.E. 23). This court has considered the motion, the response, and the reply. The motion seeks dismissal on several grounds including but not limited to Rule 12(b)(6) of the Federal Rules of Civil Procedure. That rule mandates dismissal when a complaint fails to state a cause of action.

DISCUSSION - RULE 12(b)(6)

When evaluating a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the court must accept as true facts stated in the complaint and all reasonable inferences therefrom. Jackson v. Okaloosa County, Fla., 21 F.3d 1531 (11th Cir. 1994. A district court may dismiss a complaint on a rule 12(b)(6) motion "when its own allegations indicate the existence of an affirmative defense, so long as the defense clearly appears on the face of the complaint." Fortner v. Thomas, 983 F.2d 1024, 1028 (11th Cir. 1993). Dismissal of a complaint for failure to state a claim is proper only if it is clear that no relief could be granted under any set of facts that could be proved consistent with allegations. Blackston v. State of Alabama, 30 F.3d 117, 118 (11th Cir. 1994). See also Bank v. Pitt, 928 F.2d 1108, 1111-1112 (11th Cir. 1991). In considering a motion to dismiss for failure to state a claim, averments of complaint should be construed in the light most

favorable to the plaintiff. Cannon v. Macon County, 1 F.3d 1558 (11th Cir. 1993).

Where a more carefully drafted complaint might state a claim, plaintiff must be given a least one chance to amend the complaint before the district court dismisses the action with prejudice. Friedlander v. Nims, 755 F.2d 810, 813 (11th Cir. 1985).

Rule 15(a) of the Federal Rules of Civil Procedure indicates that leave to amend "shall be freely given when justice so requires."

DISCUSSION - THE COMPLAINT

There appears to be at least some substantive merit to defendants' Motion to Dismiss. However, the rambling nature of the complaint makes it not only impossible for defendants to respond (as they have alleged) but makes it impossible for this court to make a determination as to whether or not the plaintiff can state a cause of action against any of the defendants.

This court completely agrees with the defendants that plaintiff's erudite statement that "we assert first that there need be no 'official action or policy' by which some of these defendants deprived the teacher of his constitutional rights." (pg. 3 of the response) is completely without merit. See e.g. Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Since the plaintiff is proceeding pro se and must be accorded some liberality because of his status, before addressing the numerous legal arguments made by the defense it is respectfully suggested that even a cursory review of the complaint mandates that it be dismissed, with leave to amend.

It is further recommended that the plaintiff be directed to file specific claims against specific defendants citing the basis for the claim, the basis for the court's jurisdiction, and the specific facts giving rise to the claim. It is further recommended that the plaintiff note the elements that must be shown to substantiate a claim (for example that, as noted earlier, the plaintiff must allege violation of official policies to state a cause of action and must specify the policies violated), and that the plaintiff be given 20 days to accomplish this. Following that the defendants should be allowed to file a Motion addressing these specific counts of the complaint on whatever basis they deem appropriate for the court then make a specific

determination as to whether any of the claims ought to be dismissed as a matter of law. To attempt anything less given the woefully lacking structure of the complaint, would likely be an exercise in futility.

RECOMMENDATION

It is therefore respectfully recommended that defendants' Motion to Dismiss (D.E. 23) be **GRANTED**. It is further recommended that this dismiss be without prejudice and that plaintiff be given 20 days leave to amend in accordance with the direction set forth herein. The mere fact that the plaintiff is proceeding pro se, while affording him some liberality of consideration, does not extinguish the requirements that laws, Federal Rules of Civil Procedure, Local Rules, and the like be followed.

The parties have ten (10) days from the date of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Shelby Highsmith, United States District Judge for the Southern District of Florida. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. LoConte v. Dugger, 847 F.2d 745 (11th Cir. 1988), cert. denied, 488 U.S. 958, 109 S.Ct 397 (1988).

DONE AND ORDERED this 30th day of August, 1995 at Miami, Florida.

STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

cc: Honorable Shelby Highsmith
Mel Jenkins, pro se
Peter L. Sampo, Esq.
Karen A. Brimmer, Esq.
Rudy Gomez, Esq.
William DeVane, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 95-10003-CIV-HIGHSMITH

MEL JENKINS Plaintiff,

vs.

FLORIDA KEYS COMMUNITY COLLEGE
et al. Defendants.
_____/

ORDER

THIS CAUSE came before this Court upon three Reports and Recommendations issued by Magistrate Judge Stephen T. Brown with respect to each of the following motions:

(1) Defendants Florida Keys Community College, et al.'s motion to dismiss the complaint (D.E. 23);
(2) Defendant William DeVane's motion to dismiss the complaint (D.E. # 27); and
(3) Defendants Robert Norton, Rodolfo Gomez and Jeffrey Goodz's motion to dismiss the complaint (D.E. #28).

For the reasons stated in Magistrate Judge Brown's Reports and Recommendations, and after an independant review of the file, including consideration of the plaintiff's objections and the defendants' response thereto, it is

ORDERED AND ADJUDGED as follows:

(1) Defendents Florida Keys Community College, et al.'s motion to dismiss the complaint (D.E. 23) is GRANTED, without prejudice;
(2) Defendant William DeVane's motion to dismiss the complaint (D.E. #27) is GRANTED, without prejudice; and

(3) Defendants Robert Norton, Rodolfo Gomez and Jeffrey Goodz's motion to dismiss the complaint (D.E. # 28) is GRANTED, without prejudice.

(4) Plaintiff Mel Jenkins has twenty days from the date of this order to file an amended complaint. The amended complaint shall be composed of specific claims against specific defendants. As to each claim, the plaintiff shall cite the basis for the claim, the basis for the court's jurisdiction, the specific facts giving rise to the claim, and the elements necessary to substantiate the claim. Failure to file an amended complaint that satisfies the foregoing requirements shall result in the Court's sua sponte dismissal of this action.

(5) Upon the plaintiff's filing of his amended complaint, the defendants shall have twenty days to file any appropriate motions attacking the sufficiency of the plaintiff's specific claims.

DONE AND ORDERED in chambers, at Miami, Dade County, Florida, this 16th day of October, 1995.

SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Brown
Mel Jenkins, pro se
Rudy Gomez, Esq.
William DeVane, Esq.
Karen A. Brimmer, Esq.

95-10003.ore

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-10003 CIV HIGHSMITH

MEL JENKINS Plaintiff,

vs.

FLORIDA KEYS COMMUNITY COLLEGE
BOARD OF TRUSTEES, et al. Defendants.
_____/

ORDER TO SHOW CAUSE

This matter is before this court sua sponte. On November 16, 1995, this court sent out a Notice of Hearing which was set for November 30, 1995, at 2:00 P.M. The notice was sent to all parties at their addresses as listed in the court file. At 2:00 P.M. on November 30, 1995, all parties were present for said hearing, except the plaintiff. The court waited until after 2:30 P.M. to see if plaintiff would appear or call, but neither happened.[1]

Accordingly, it is hereby **ORDERED AND ADJUDGED** that plaintiff shall have five (5) days from the date of this order to show cause to this court, in writing, why this court should not recommend dismissal of this case and/or sanction the plaintiff for his failure to appear.

DONE AND ORDERED this 4th[2] day of December, 1995 at Miami, Florida.

_____
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

cc: Honorable Shelby Highsmith
Mel Jenkins, pro se
Peter L. Sampo, Esq.
Karen A. Brimmer, Esq.

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[1]Indeed, the court neither saw nor heard from the plaintiff at all on the day of the hearing or later.

[2]This order was sent by certified mail; duplicate service again 4 days later.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CIVIL ACTION
MAGISTRATE JUDGE STEPHEN T. BROWN
95-10003-CIV-HIGHSMITH/BROWN

JANUARY 18, 1996

MEL JENKINS,
PLAINTIFF,

VS.

FLORIDA KEYS COMMUNITY COLLEGE BOARD OF TRUSTEES, ET AL.,
DEFENDANTS.

MOTION TO CHANGE VENUE OF PROCEEDINGS

Motion

The plaintiff, Mel Jenkins, does hereby move the Court to stay the hearing ordered by magistrate Stephen T. Brown on January 3, 1996, to take place on February 8, 1996 in Miami, and also, moves the Court to order that all future proceedings in this case take place at the Key West branch of the United States District Court, Southern District of Florida, subject to court prior approval for the holding of any individual proceeding elsewhere for exceptional or compelling reasons, upon motion by any party to the action.

Memorandum in Support

1. Magistrate Stephen T. Brown on January 3, 1996 ordered a hearing on matters in this case, to take place at 2:00 P.M., in Courtroom VIII, at the United States Courthouse Building, 300 N.E. First Avenue, Miami, Florida. The purpose of that hearing is irrelevant to the issues presented herein regarding a change of venue. We ask the court to reserve judgment on issues to be addressed at that hearing until the plaintiff has had a fair opportunity to address them. In other

words, we ask the court to afford the plaintiff due process by not condemning him before a fair hearing. We urge the court not to read this motion as Justice Jackson said "with a hostile eye," in United States v. Carolina Ft. Carriers Corp., 315 U.S. 475, 491, or with an "adverse mind," as Justice Holmes warned in Leary v. United States, 224 U.S. 567, 576.

2. The issue of venue is raised now because plaintiff recently learned the magistrate called the above described hearing in *Miami* rather than *Key West*. The Key West Federal court house is where the plaintiff filed his initial complaint a year ago in January of 1995, and plaintiff heretofore presumed all hearings and the trial would be in Key West at the local Federal court house.

3. All but 3 of the 18 parties to this case have their usual place of business and domicile proximate to Key West. The 3 exceptions are defendants who committed their alleged fraud while representing one of the other defendants——namely Florida Keys Community College, whose principal place of business is located proximate to Key West. Whereas the actions being litigated in this case occurred proximate to Key West, nearly all the witnesses will be summoned from in or around Key West. Plaintiff alone expects to call more than 30 witnesses from the Key West area. Summoning witnesses from Key West to appear in Miami, many of them more than once, would be unreasonably burdensome to them as well as to the plaintiff——and probably to the defendants as well.

4. Miami is approximately 150 miles from Key West. Travel time by automobile to Miami from Key West can often take 3 or more hours, depending on traffic along the predominantly 2 lane highway up through the Florida Keys, especially during the Winter season when the road is congested with slow moving recreation vehicles and sightseers.

5. Moreover, the plaintiff, in addition to many of the witnesses, would need additional time to locate the Federal Court House in Miami. Some will probably get lost and be delayed, or find it necessary to embark an hour or two early in order to insure arriving on time. For those people who live in the Miami area, finding the Miami court house may be simple, but for many people from the Florida Keys, Miami can be very confusing, requiring additional travel time.

6. When this case began, plaintiff was puzzled as to why he was told to file all his pleadings and motions with a magistrate and judge at the Miami Federal court house. Plaintiff being a layman, assumed this was standard operating practice,

but also assumed that any hearings, conferences, and the trial, would be held in Key West. Several Federal judges names are listed at the Key West federal court house, presumably indicating they perform some judicial business there. Plaintiff was alerted to the possibility the court may plan to conduct all proceedings of this case in Miami, upon the magistrate recently calling a hearing in Miami.

7. Plaintiff is perplexed as to why this may be so and why the court has assigned a judge and magistrate from Miami, rather than one assigned to the Key West court house. The Key West Federal court house appears to several ordinary citizens plaintiff has recently talked to, to be a functioning facility. Plaintiff has been told by local lawyers that Federal judges have their chambers there. The Key West Federal court house is located on a multimillion dollar chunk of prime downtown Key West real estate, which is some of the most expensive real estate in the nation. Plaintiff is perplexed as to the purpose of that tax-payer funded court house, if not to handle cases arising in this local geographical area?

8. Plaintiff asked a few ordinary citizens he met on the street about this situation, to garner a ordinary man's perspective, and their response was twofold: (a) that some work may go on at the Key West Federal court house, but like the military base, where there are hundreds of expensive yachts obviously not owned by local servicemen, the Key West court house is merely a front for a judicial vacation retreat on a tropical isle; and (b) that since the defendants' lawyers are from Miami, they probably surreptitiously had something to do with the case being assigned to Miami judges. This was of course merely their speculation. Plaintiff does not actually know why one of the Key West Federal judges was not assigned to handle this case, but it seems clear to plaintiff that even to the common man on the street, *it has the appearance of impropriety*.

9. One of these men further said to plaintiff: "How would it look to you, if a bunch of people who live in Miami, involved in a lawsuit over actions that occurred up there, wound up in Key West, where the wealthy defendants' expensive lawyers happened to be located?"

10. The defendants, who are Florida Keys Community College and its chief officers and agents, live in or around Key

West[3]. These defendants were under no duress when they chose to hire legal counsel located in Miami. There are lawyers in Key West who are members of the Federal bar, which the defendants could have retained. However, because the defendants have deep public pockets, as a multimillion dollar taxpayer funded agency, they chose to hire highly paid lawyers from Miami rather than less expensive local lawyers. In plaintiffs opinion, defendants did so knowing and expecting an additional financial burden for communication with, and travel of their 'remote counsel'. In contrast, consider that if plaintiff retained an attorney from Jacksonville, surely, plaintiff would be responsible for that attorney's travel expenses into this district to appear at conferences, hearings, and the like. Moreover, if plaintiff hired a Florida licensed attorney who resides in Palm Springs California during the Winter, would the court allow proceedings to be held in California for his sake? Obviously not.

11. The defendants and court unrealistically expect the plaintiff to travel to Miami for the proceedings in this case[4]. Plaintiff reminds the court he has been granted *in forma pauperis* status as a result of his extremely bereft financial circumstances. These defendants have callously stated that plaintiff can "easily fly to Miami or spend the night there." That is patently ridiculous. Plaintiff has been unemployed for all but approximately two weeks of the last two years— — since November of 1993, when his livelihood was unlawfully terminated by actions of the defendants. Plaintiff barely survives on a subsistence level income and simply cannot afford to be traveling back and forth between Miami and Key West for hearings, conferences, and so forth. Furthermore, this makes no sense when a Federal court house is within walking distance of plaintiff's domicile and that of many defendants' and witnesses' in this case.

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[3] Except for 3 of the lawyer-defendants who represented the college in Key West, and committed alleged fraud in doing so.

[4] An alternative consideration for the court, is to conduct hearings via telephone. Last year the Florida Unemployment Commission conducted a telephone hearing with this plaintiff and several of these defendants, regarding an appeal of plaintiff's unemployment compensation benefits— which the defendants eventually withdrew. Such Unemployment Bureau hearings are routinely held via conference telephone when the parties are located in the Florida Keys. Provision is made in the Federal Rules of Civil Procedure for at least some telephone proceedings.

12. Plaintiff simply does not have the financial capability to be traveling to and from Miami, with the attendant costs in food, transportation, and perhaps lodging. The opulent salary federal judges receive, which as Publius[5] argued was necessary to discourage judicial corruption, might for the most part adequately serve that intended purpose, but on the other hand it appears to foster insensibility to the financial limitations of the poorer members of this society.

13. It may be surprising to the wealthy members of this society, but there are people like this plaintiff, who cannot afford to be traveling 150 miles back and forth from Key West to Miami. Utilizing commercial transportation, in addition to being prohibitively expensive, would be problematic for the plaintiff——since it would likely require layovers in Miami which plaintiff cannot afford. The last time plaintiff drove his own vehicle to the mainland, last summer, it took him 5 hours due to repeated breakdowns. His 15 year old pick up truck remains in disrepair due to financial incapacity[6]. As a consequence, plaintiff views the prospect of proceedings in Miami ***extremely burdensome and oppressive***, not only to himself, but also eventually to many of the witnesses to be called in this case. In fact, plaintiff will very likely withdraw his complaint——at least for the present, if he is required to carry this action forward via proceedings in Miami.

14. Plaintiff contends that proceedings held in Miami would contravene the Constitution, which "is intended to prevent oppression." as Justice McKenna said in Brown v. Elliot, 225 U.S. 392, 402. This kind of oppression is nothing new. Judicial systems have been oppressing the poorer members of their societies for a very long time. As early as six centuries before Christ was born, this was a topic of discussion between two of the Seven Sages of Ancient Greece, wherein Anacharsis once said to Solon: "Written laws are like spider's webs, and will like them only entangle and hold the poor and weak, while the rich and powerful will easily break through them." Six hundred years after Anacharsis, and nearly two thousand years ago the problem still persisted, as Jesus Christ reproached: "And you experts in the law [lawyers and judges], woe to you, because you load people down with burdens they can hardly carry, and you yourselves will not lift one finger to

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[5] Pseudonym for Hamilton, Jay, and Madison; see *The Federalist Papers*.

[6] Due to his unlawful termination being contested in this action.

help them." Bible, NIV, Luke 11.46. In a more recent century Oliver Goldsmith in *The Traveler*. L. 386 wrote: "Laws grind the poor, and rich men rule the law." Here we are approaching the second millennium, with a judicial system that still favors the wealthy and oppresses the poor.

15. There is hope for the poor however in the opinions of the Justices of the U.S. Supreme Court, who have stated for instance that "[a] man's mere property status, without more, cannot be used by a state to test, qualify or limit his rights as a citizen of the United States."—Justice Jackson: Edwards v. California, 314 U.S. 160, 184; and "Justice is indiscriminately due to all, without regard to numbers, wealth, or rank." Justice Jay from Georgia v. Brailsford, 2 Dall. (2 U.S.) 483, 484.

16. "It may be said to be generally true that the weaker a party and the smaller his interest the greater the need of the strong hand of the court to ascertain and protect his rights."—Justice Brewer: Montana Co. v. St. Louis M. & M. Co., 152 U.S. 160, 170. "Under our constitutional system, courts stand against any winds that blow, as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered..."—Justice Black: Chambers v. Florida, 309 U.S. 227, 241.

17. Plaintiff recognizes that this request to hold proceedings in Key West may not be in *conformity* with the *standard operating practice* of this court, and that it may be "convenient" for the court to hold proceedings in Miami. Nevertheless, "The idea that a Constitution should protect individual nonconformity is essentially American."—Justice Jackson: American Com. Assoc. v. Douds, 339 U.S. 382, 443. "Few formulas are so absolute as not to bend before the blast of extraordinary circumstances."—Justice Cardozo: Evangelical Luth. Church v. Sahlem, 254 N.Y. 161, 167.

18. Plaintiff asserts such extraordinary circumstances in this case. "To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society."—Justice Frankfurter: Wolf v. Colorado, 338 U.S. 25, 27. "Practical adjustments, rather than a rigid formula, are necessary."—Justice Douglas: Consolidated Rock Prod. Co. v. Du Bois, 312 U.S. 510, 529. "Happy it is when the interest which the government has in the preservation of its own power coincides with a proper distribution of the public burdens and tends to guard the least wealthy part of

the community from oppression!" Alexander Hamilton, *The Federalist Papers*, No. 36.

19. Plaintiff recognizes that it may be more 'expedient' for the court to hold proceedings in Miami where the Federal Southern District of Florida is headquartered. However "The protection of the public interest *** is more imperative than the despatch of judicial business."—Justice Reed: Insurance Gr. Comm. v. Denver & R. G. W. R.R., 329 U.S. 607, 631.

The hungry judges soon
the sentence sign,
And wretches hang that
jurymen may dine.

Alexander Pope (1688-1744)

20. Plaintiff feels that proceedings held in Miami would force him to lie in a *Procrustean bed*[7]. As Justice Frankfurter remarked in Kingsley Co. v. Regents, 360 U.S. 684, 697: "the Due Process Clause is the very antithesis of a Procrustean rule." The magistrate may be satisfied that proceedings in Miami would treat plaintiff and defendants *equally*, since both would have the same burden of appearing at the same court house. On the contrary, the defendants' attorneys are already located in Miami, so a burden of travel would hardly be equal, and secondly, plaintiff pleads the court should look beyond simple "equal treatment." Plaintiff seeks not equal treatment in this circumstance, but equity. As Anatole France (1844-1924) sarcastically noted: "The law, in its majestic *equality*, forbids rich and poor alike to sleep under bridges, beg in the streets or steal bread."

21. As Aristotle wisely philosophized so long ago: "Justice, consists in treating equals equally and *unequals un-*

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[7] Procrustean: A legendary robber of ancient Greece who forced his victims to fit a certain bed by stretching or lopping off their legs. A "Procrustean bed" is a complete disregard of *individual differences or special circumstances* and that arbitrarily, often ruthlessly or violently, forces one into conformity with or subservience to something (as a system, policy, doctrine). "Procrustean reasoning," and "Procrustean determination" is to make the evidence fit the theory; also see: "Procrustean methods;" "Procrustean legislation."

equally but in proportion to their relevant differences." Plaintiff asserts that his exceptional circumstances warrant this "unequal treatment" so he may have a fair opportunity to present his pleas to the court. As Justice Brewer said: "It is not enough that the doors of the temple of justice are open; it is essential that the ways of approach are kept clean." Hatfield v. King, 184 U.S. 162, 168. Proceedings in Miami might be superficially equal for plaintiff and defendants alike, however, they would be an oppressively equal *Procrustean bed* for the plaintiff.

22. Plaintiff recognizes this court may possess the judicial discretion to dictate proceedings be held in Miami. Plaintiff notes however that "The discretion of the court, although guided by precedent, is controlled, in its final exercise, by a sense of equity and justice."—Justice Cardozo: Central Tr. Co. v. Pittsburgh S. & N.R.R., 229 N.Y. 68, 71, and "Justice consists in doing no injury to men." Cicero (106-43 B.C.). And after all, discretion is "never without limits."—Justice Harlan: System Fed. v. Wright, 364 U.S. 642, 648. Consequently "[l]ower court decisions have no finality as to the law. The lawyers who fight them and the judges who write them know that they are inconclusive."—Justice Jackson: *Struggle for Judicial Supremacy*, (1941) p.303. If this court persists in ordering plaintiff to proceed in Miami——under duress, plaintiff will as they say: "put the dice into the box for another throw[8]."—Ambrose Bierce (1842-1914).

23. In closing, plaintiff incidentally notes that Federal Southern District of Florida Rule 1.A.2. prescribes that "Monroe County actions and proceedings shall be tried at Key West, Florida." The term 'proceeding,' being inclusive of 'hearings,' this District rule appears to imply and anticipate that the hearings of the instant case should be held in Key West. Although this court may ultimately have the discretionary authority to ignore this rule, when all is said and done, plaintiff thinks this rule makes good sense for the reasons stated *supra*, and beseech the court to follow the obvious purpose of this rule, and the apparent purpose of an existing Key West Federal Court House.

Mel Jenkins

[8] In other words, utilize FRAP Rule 21 and 28 U.S.C. §1651(a) & (b).

95-10003.orf

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-10003 CIV HIGHSMITH

MEL JENKINS

Plaintiff,

vs.

FLORIDA KEYS COMMUNITY COLLEGE, BOARD OF TRUSTEES, et al.

Defendants.

_____/

ORDER RE: MOTION TO CHANGE VENUE OF PROCEEDINGS

This matter is before this court on plaintiff's Motion to Change Venue of Proceedings, dated January 18, 1996. This court has considered the motion and all pertinent matters in the file. The court being otherwise fully advised in the premises, it is therefore **ORDERED AND ADJUDGED** as follows:

1. The motion seeks to stay the hearing presently set for February 8, 1996. That motion is **DENIED.**

2. The motion also seeks an order that all future proceedings in this case take place at the Key West branch of the United States District Court. Notwithstanding the venomous rhetoric that permeates the motion[9], the plaintiff recognizes that the court has discretion as to where to hold hearings.

It is true, as noted by plaintiff that Local Rule 3.1.D. (not 1.A.2) indicates that actions and proceedings shall be tried at Key West, Florida, but, given the nature of these proceedings

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[9]This court will, at least temporarily, let pass with a warning, the borderline contemptuous verbiage in the motion such as "the Key West court house is merely a front for a judicial vacation retreat ...", "... since the defendants' lawyers are from Miami, they probably surreptitiously had something to do with the case being assigned to Miami judges..", "...[T]he opulent salary federal judges receive...". Further, similar comments, may well result in recommendation of contempt.

the court finds it would be far more expensive and disruptive to hold every hearing in Key West.

The court would further note for plaintiff's benefit that, contrary to the rumors and innuendos contained in plaintiff's motion, there is no U.S. District Judge who regularly sits in Key West, and no full-time Magistrate Judge who presides there, either. Furthermore, the Southern District of Florida is... the Southern District of Florida. It stretches from Fort Pierce to Key West and it is not at all unusual for cases to be handled, and even tried, in places that are not the most convenient. For example, there are several cases filed in Miami, involving Miami litigants and Miami lawyers, that are being handled in West Palm Beach as a result of the location of the particular District Judge who randomly drew the case assignment.

Therefore the motion to schedule all further proceedings in Key West is **DENIED,** though by so ruling the court is not precluding the possibility that some of the proceedings might take place in Key West, and would defer to the District Judge regarding the venue of the trial, if and when that decision need be made.

Finally, the request to conduct hearings by telephone, while not an unreasonable one, is **DENIED**. The reason for the denial is that, despite plaintiff's inference of all the opulent salaries and surroundings of the Federal Court, this court does not have the facilities to accommodate a telephone hearing, given the number of parties involved.

DONE AND ORDERED this 24th day of January, 1996 at Miami, Florida.

STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

cc: Honorable Shelby Highsmith
Mel Jenkins, pro se
Peter L. Sampo, Esq.
Karen A. Brimmer, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 95-10003-CIV-HIGHSMITH

MEL JENKINS
Plaintiff,

vs.

FLORIDA KEYS COMMUNITY COLLEGE, et al.
Defendants.
_____/

ORDER

THIS CAUSE came before the Court upon Plaintiff Mel Jenkins' Objection to Order Denying Change of Venue. The plaintiff's objection is lodged against an order issued by Magistrate Judge Stephen T. Brown, denying the plaintiff motion to change an upcoming hearing from Miami to Key West. The Court deems the objection as an appeal from the Magistrate Judge's order, pursuant to 28 U.S.C. §636 (b)(1)(A). The standard of review for such appeals is "clearly erroneous or contrary to law." Magistrate Judge Brown's order is neither. Accordingly, it is

ORDERED AND ADJUDGED that the Order Denying Change of Venue is AFFIRMED.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 7th day of February, 1996.

_____
SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Brown
Mel Jenkins, pro se
Peter L. Sampo, Esq.
Karen Brimmer, Esq.

95-10003.rrd

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 95-10003 CIV HIGHSMITH

MEL JENKINS Plaintiff,
vs.
FLORIDA KEYS COMMUNITY COLLEGE, BOARD OF TRUSTEES, et al. Defendants.
_____/

REPORT AND RECOMMENDATION

This matter is before this court sua sponte. On February 8, 1996 this court held a hearing to determine whether the amended complaint should be stricken for failure to comply with Fed.R.Civ.P. 8(a) and for plaintiff to show good cause why sanctions should not be imposed for his failure to notice the court of his new address and causing the court and defense counsel to appear for a "non-hearing" (which was held on November 30, 1995). For the reasons which follow, this court respectfully recommends that this case be dismissed.

BACKGROUND

Plaintiff filed an "Initial Pleading and Complaint" on January 13, 1995. That document consisted of 20 pages and 184 paragraphs. On August 30, 1995 this court recommended that the complaint be dismissed without prejudice. This court noted at the time that since the plaintiff was proceeding pro se, consideration to the plaintiff must be given. In that Report and Recommendation it was recommended that plaintiff file specific claims against specific defendants citing the basis for the claims, the basis for the court's jurisdiction, and the specific facts giving rise to the claim. This court laid out in specific detail its suggestions as to how plaintiff could properly file a complaint that would be capable of being reviewed by the court. That Report and Recommendation was affirmed (D.E. 49). The order affirming same also went into detail as to the specific contents that were required in plaintiff's amended complaint. The order further specified "[F]ailure to file an amended complaint that satisfies the foregoing requirements shall result in the Court's sua sponte dismissal of this action."

Plaintiff thereafter filed an "Initial Pleading and Complaint, Amended". Said complaint is 500 pages in length.

On November 16, 1995 this court sent a notice of hearing "on why amended complaint should not be stricken for failure to comply with Fed.R.Civ.P. 8(a)." That notice was sent to the plaintiff at his address of record. The hearing was scheduled for November 30, 1995. Plaintiff failed to appear at that hearing, without any notice or reason for his lack of appearance. Accordingly, on December 4, 1995 this court issued an order to show cause. That order indicated that all parties were present except for the plaintiff and that the court waited for a full 30 minutes after the scheduled time of the hearing to allow counsel to depart. The order sought from the plaintiff, in writing, reason why the court should not recommend dismissal of the case and/or sanction the plaintiff for his failure to appear. That order, dated December 4, 1995, gave the plaintiff 5 days to respond. Notwithstanding the fact that the certified mail/return receipt's indicate that plaintiff received the order to show cause (at two different addresses) on December 8th and December 11th, 1995, respectively, plaintiff's response to the order to show cause was not filed with the court until January 2, 1996.

The response to the order to show cause conveys "apologies to the court and defendants..." but alleges plaintiff had not received the Notice of Hearing. The reason the plaintiff had not received the notice is because plaintiff allegedly no longer received mail at the address which is on file in the court record, but rather now has a post office box. Plaintiffs response suggests "[W]e do notknow why Notice of Hearing was not redirected to the new address. We are sorry for not notifying the parties and Court of the new address earlier...the plaintiff no longer has a street address and therefore the post office address will have to suffice." This response leaves more questions unanswered than it answers. The order to show cause sent out by the court on December 4, 1995 was sent certified mail, return receipt requested. It was sent both to the address of record in the court file as well as the P.O. Box referred to by the plaintiff in plaintiff's response.[10] The return receipts indicate that plaintiff, himself, received the order to show cause at the address in the court file on December 8, 1995, and signed for the one at the post office box three

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[10] This address was located on an envelope sent in by the plaintiff (return address) but appears nowhere in any of the pleadings or motions or papers filed in the court file.

days later. In light of the fact that "the plaintiff no longer has a street address..." this court wonders how he could have signed for mail on December 8, 1995 at the very address in the court file. Perhaps, plaintiff would suggest, that mail was forwarded to post office box. If that were so, however, how did it get there three days before the item sent directly to his post office box (which he signed for 3 days later)?

Nonetheless, plaintiff's response offered no good cause why he did not appear at the hearing other than his neglect and failure to notify the court of an alleged address change.

Notwithstanding the vitriolic dialogue contained in plaintiff's response (and virtually every other paper he has filed), this court chose to re-schedule the hearing on why the amended complaint should not be stricken and further to offer plaintiff an opportunity to show good cause why sanctions should not be imposed due to the inconvenience to the court and, more importantly, expense of the defendants in having counsel appear for the hearing which did not take place as a result of plaintiff's failure to appear. The new hearing was scheduled for February 8, 1996.

The notice rescheduling the hearing was sent to plaintiff on January 3, 1996. On January 19, 1996 plaintiff filed a Motion to Change Venue of Proceedings (D.E. 63). This court denied that motion on January 24, 1996. Plaintiff objected to this court's order which was affirmed by Judge Highsmith on February 7, 1996.

On February 8, 1996 at 2:00 P.M. the scheduled date and time of said hearing counsel for the defense was present but the plaintiff, again, did not appear.

DISCUSSION

It appears that plaintiff has a propensity to fail to comply with orders of the court. Plaintiff failed to appear at the first hearing on the propriety of allowing the amended complaint to stand, failed to timely comply with this court's order to show cause of December 4, 1995, failed to comply with this court's order denying the motion to change venue, and finally did not appear after Judge Highmith affirmed this court.

It therefore appears that plaintiff's complaint is ripe for dismissal for lack of prosecution. Additionally, without the plaintiff appearing to explain why there is any merit to allowing the voluminous amended complaint to stand, it is the opinion of this court that the amended complaint (all 500 pages of it) fails to comply with Rule 8(a) of the Federal Rules

of Civil Procedure, and more particularly that portion of the rule which requires (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, and (2) a short and plain statement of the claim....

Finally, under the inherent power of the court, the court may grant the sanction of dismissing this complaint for the repeated failure of the plaintiff to justify the complaint and to comply with orders of the court.

RECOMMENDATION

This court respectfully recommends that this case be dismissed for lack of prosecution and/or as sanctions for failure of the plaintiff to make any effort to comply with orders of this court and/or to justify the existence of this complaint. In the event that the court chooses not to dismiss the case on this basis, it is secondarily recommended that the complaint be dismissed without prejudice, with leave to file another amended complaint, though this court would note that plaintiff was previously admonished that the complaint would be dismissed if the amended complaint did not comply with appropriate requirements.

In the event this court allows this case to remain pending, in whatever form, it is finally recommended that an order to show cause be issued as to why sanctions should not be imposed for the failure, once again, of plaintiff to appear at the most recent hearing.

The parties have ten (10) days from the date of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Shelby Highsmith, United States District Judge for the Southern District of Florida. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. LoConte v. Dugger, 847 F.2d 745 (11th Cir. 1988), cert. denied, 488 U.S. 958, 109 S.Ct 397 (1988).

DONE AND ORDERED this 13th day of February, 1996 at Miami, Florida.

STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

cc: Honorable Shelby Highsmith
Mel Jenkins, pro se
Peter L. Sampo, Esq.
Karen A. Brimmer, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 95-10003-CIV-HIGHSMITH

MEL JENKINS Plaintiff,
vs.

FLORIDA KEYS COMMUNITY COLLEGE,
et al. Defendants.
_____/

FINAL ORDER OF DISMISSAL

For the reasons stated in Magistrate Judge Stephen T. Brown's Report and Recommendation, dated February 13, 1996, and upon an independent review of the record, it is

ORDERED AND ADJUDGED this cause be and the same is hereby DISMISSED without prejudice. All pending motions not otherwise ruled upon are DENIED as moot and this case is CLOSED.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 6th day of March, 1996.

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SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Brown
Mel Jenkins, pro se
Peter L. Sampo, Esq.
Karen Brimmer, Esq.

No. _____
October Term, 1997

In the
Supreme Court
of the
United States of America

Mel Jenkins, Petitioner

v.

Florida Keys Community College, et al., Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Petition for Writ of Certiorari

Appendix
B

Mel Jenkins, *Pro Se*
PO Box 2525
Key West, FL 33045

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Appellate Docket No.: 96-4456

APPELLANT BRIEF

Mel Jenkins - Appellant

vs.

Florida Keys Community College, et al. - Appellees.

Appealed from

U.S. District Court
Southern District of Florida

District Court No.: 95-10003-CIV-SH

Appellant Mel Jenkins appearing *pro se*.

Counsel for Appellees:

Peter L. Sampo, Esq., *Hogg, Allen, Norton & Blue, P.A.*, attorney for defendants Robert Norton, Jeffrey Goodz, and Rodolfo Gomez.

Marlene S. Reiss, Esq., *Stephens, Lynn, Klein & McNicholas, P.A.*, attorney for the remaining defendants.

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United States Court of Appeals
Eleventh Circuit
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DISTRICT COURT NO.: 95-10003-CIV-SH	APPELLATE DOCKET NO.: 96-4456
MEL JENKINS, APPELLANT, vs. **FLORIDA KEYS COMMUNITY COLLEGE, ET AL., APPELLEES.**	**INITIAL APPELLATE BRIEF**

This is an appeal of dismissal without prejudice of appellant's complaint by the U.S. District Court, Southern District of Florida. The primary issue is whether the district court abused its discretion is dismissing the complaint.

The appellant in this case is Mel Jenkins, formerly a tenured teacher of computer science at the appellee Florida Keys Community College, which is a public college located proximate to Key West, Monroe County, Florida. This case in large part began during the summer of 1992 when the appellee college officers and agents began an investigation of the teacher, allegedly prompted by some student complaints his speech was offensive. Approximately 6 months thereafter in February of 1993, the appellee college president recommended to the board of trustees the teacher be terminated. Shortly thereafter the teacher was suspended and ordered not to renter the campus. A public hearing was held pursuant to the Florida Administrative Procedures Act, in the summer of 1993. A few months later, in November of 1993, he was terminated by the board of trustees. The teacher appealed, pursuant to Florida law, to the District Court of Appeal, Third District of Florida. The Florida Court of Appeal affirmed the termination in October 1994.

Brief History Of Federal Appeal

Shortly after the Florida appellate court affirmed the board's final order, in January of 1995, the teacher filed a

complaint against the college and several of its officers and agents involved in the termination, at the federal district court in Key West. A federal judge and magistrate judge located in Miami were assigned to the case and appellant was told by the court clerk staff at Key West to file all subsequent papers in Miami rather than Key West Branch of the U.S. Southern District of Florida.

The initial complaint filed by appellant was 20 pages long and composed of several claims against the 17 appellees. During the first few months there was an issue regarding service of the summons and complaint. Once that was resolved attorney's for the appellees requested appellant appear in Miami to be deposed. Appellant moved for a protective order, arguing that appearing in Miami would be unduly burdensome. The magistrate denied appellant's motion for a protective order. Appellant then appealed to the district judge, who declared the matter moot because the intended deposition date had already passed. Nevertheless, the district judge noted in his order that "there is, substantively, some merit to appellant's motion." No depositions, interrogatories, or admissions, have taken place in this case to date, for the most part because no complaint has crystallized upon which relevant discovery can proceed. Subsequent to the initial complaint, one amended complaint was filed but dismissed for the reasons described *infra*.

Throughout 1995 and most of 1996, several motions, responses, objections, orders, and other papers were entered into the record by the litigants and district court. The appellees challenged the initial and amended complaint. The appellees argued the initial complaint was *inter alia*, insufficiently definite and the claims barred by *res judicata*. The district court dismissed the complaint, giving appellant twenty days to file an amended complaint. The court stated in its opinion the:

> "rambling nature of the complaint makes it not only impossible for appellees to respond (as they have alleged) but makes it impossible for this court to make a determination as to whether or not the appellant can state a cause of action against any of the appellees."

The district court then directed the appellant to file an amended complaint which

> "shall be composed of specific claims against specific appellees. As to each claim, the appellant shall cite the

basis for the claim, the basis for the court's jurisdiction, the specific facts giving rise to the claim, and the elements necessary to substantiate the claim."

Appellant then filed a 500 page amended complaint. The district court not satisfied with the amended complaint, called a hearing. It appears the court deemed the complaint in violation of the "short and plain" provision of Rule 8(a) Fed.R.App.P. The district court then apparently mailed to appellant a notice of hearing on the complaint, on November 16, 1995. The hearing was scheduled for November 30th. Appellant did not receive the notice. He did not appear as a result. Apparently, the hearing was canceled after the magistrate judge and appellee attorneys waited half an hour or so for appellant to appear.

A few days later the magistrate issued an order for appellant to show cause why the case should not be dismissed and or appellant sanctioned for his failure to appear at the hearing. Appellant responded explaining *inter alia*, his mailing address had changed and for some unknown reason the notice was never forwarded to his new address. On January 3, 1996, the magistrate signed a second notice of hearing, to be held on February 8, 1996. Like the initial aborted hearing, the rescheduled hearing was designated to be held in Miami.

On January 18th, appellant being recently apprised by the notice of hearing, that the venue of proceedings would be in Miami, moved to stay the hearing and change the venue of subsequent proceedings to Key West. The magistrate denied the motion on January 24th. Appellant served an appeal to the district judge on February 4th, who on February 7th, affirmed the magistrate's order denying a change of venue. The next day, on February 8th, the magistrate and appellees' attorneys appeared for the second called hearing, but appellant did not.

Five days later, on February 13th, appellant received notice: (1) the Miami venue was affirmed by the district judge on February 7th, (2) the hearing would go forth in Miami on the 8th, and (3) the magistrate had recommended the complaint be dismissed and appellant sanctioned for *inter alia*, not appearing at the hearings. The district judge dismissed the amended complaint without prejudice on March 6, 1996 "For the reasons stated in Magistrate Judge Stephen T. Brown's Report and Recommendation, dated February 13, 1996, and upon an independent review of the record." Thus the magistrate's Report and Recommendation by direct reference became the

opinion of the district court. The Report section describes the reasons for dismissal. The Report section does not proffer alternative reasons for dismissal. Therefore all reasons stated in the Report were reasons for dismissal. The Recommendation section however, is presented alternatively:

This court respectfully recommends that this case be dismissed for lack of prosecution and/or as sanctions for failure of the appellant to make any effort to comply with orders of this court and/or to justify the existence of this complaint. In the event that the court chooses not to dismiss the case on this basis, it is secondarily recommended that the complaint be dismissed without prejudice, with leave to file another amended complaint, though this court would note that appellant was previously admonished that the complaint would be dismissed if the amended complaint did not comply with appropriate requirements.

In the event this court allows this case to remain pending, in whatever form, it is finally recommended that an order to show cause be issued as to why sanctions should not be imposed for the failure, once again, of appellant to appear at the most recent hearing.

The gist of the recommendation was that the complaint be dismissed either:

(A) preferably with prejudice for appellant's failure to:
  (1) prosecute the case, and or
  (2) make any effort to comply with court orders, and/or
  (3) justify existence of his complaint,

(B) alternatively, without prejudice with leave to amend, and an order for appellant to show cause why sanctions should not issue for failure to appear at the most recent hearing.

Appellant objected to the Report and Recommendation on February 29, 1996. The district judge went forward and adopted a portion of one alternative Recommendation. He dismissed the case <u>without</u> prejudice but no order was issued to show cause why <u>sanctions</u> should not issue for failure to appear at the hearings. Appellant then filed a timely appeal to this U.S. 11th Circuit Court of Appeal.

It appears to this *pro se* non-lawyer appellant, that a U.S. Court of Appeals must accept a district court's findings of fact if they are not *clearly erroneous*, but conclusions of law are fully reviewable. There were no designated findings of fact or conclusions of law as such in the Report and Recommenda-

tion, i.e. the opinion. As a consequence appellant is burdened with adducing whatever facts and conclusions may randomly present themselves throughout the opinion. Whatever reasons appellant could glean therefrom, appellant addresses and appeals herein.

Whereas the district court dismissed "For the reasons" stated by the magistrate in his Report and Recommendation, and the court did not indicate disagreement with any of the magistrate's reasons therein, it is necessary to conclude all reasons the magistrate gives for dismissal were adopted by the district court as its opinion and constitute its reasons for dismissal.

Although the district court dismissed 'without' prejudice, appellant asserts that the reasons it opines for dismissal should be reviewed by this appellate court as reasons for dismissal 'with' prejudice. For this reason: whereas appellant has been adjudicating a large portion of this civil action first in the Florida judicial system for proximately two years, and then immediately thereafter in this federal judicial system for proximately two years, the statute of limitations might now preclude many—perhaps all of his claims from being reasserted in a second amended complaint.

In other words, the district court ostensibly mercifully dismissed 'without' prejudice, but may have in actual effect dismissed 'with' prejudice. Therefore the reasons the district court provides for dismissal should be reviewed and weighed by the appellate court as foundation for what may be an extremely harsh decision to preclude any future consideration of the actual merits of appellant's claims. The reasons for such a harsh decision should also be weighed against the long standing liberal allowances ordinarily extended to a *pro se* appellant[11].

The district court opines, appellant failed to show "why there is any merit" to his complaint, and that he repeatedly failed "to justify the complaint." The actual opinion is inconsistent with the district court final order dismissing 'without' prejudice. If there is no merit to the claims, assuming all proffered facts in the complaint true, then the dismissal should have been 'with' prejudice. It was not, because the district

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[11] The district court gave the customary *pro se* boilerplate—*pro forma*—in actuality carrying fire in one hand and water in the other.

court did not assess the claims and is in no position to without a doubt determine they all lack merit.

The district court dismissed the case for the following reasons:

(A) as a sanction against the appellant for—
  (1) failure to obey district court orders,
    (a) to appear at two hearings, inconveniencing the magistrate judge and appellees' attorneys, and
    (b) to timely show good cause for his failure to appear at those hearings, when ordered to do so;
  (2) failure to make any 'effort' to comply with orders of the district court, and for a propensity to disobey district court orders;
  (3) repeated failure to justify the existence of the complaint;
  (4) failure to notify the court of his address change, and lying to the court,
    (a) about his true address,
    (b) and that he did not receive notice of the first hearing at his home address; and
  (5) using venomous rhetoric and vitriolic dialogue in virtually every paper he filed;

(B) for failure to prosecute, specifically—
  (1) to obey district court orders, and
  (2) for repeated failure of appellant to 'justify' the complaint;

(C) for filing a complaint which—
  (1) lacked specific claims against specific defendants, the basis for the claims and the court's jurisdiction, the specific facts giving rise to each claim, and the elements necessary to substantiate the each claim; and which
  (2) violates the "short and plain" requirement of Rule 8(a) Fed.R.App.P.

Appellant appeals the dismissal for the following reasons in brief:

The district court erred when it found appellant disobeyed its order to appear at the first hearing it called. Appellant did not receive notice of the first hearing. The district court apparently mailed the notice of hearing to a valid address for appellant but he never received it, presumably due to a U.S. Postal Service error. Nonetheless, appellant would not have

appeared even if notified, for reasons discussed *infra*. With regards to the second hearing, after appellant was notified of a hearing called in Miami, he moved for a change of venue. He was not notified that hearing would go forward until after it had already occurred.

The hearings were called in Miami, 150 miles from where local federal rule specifically mandates proceedings in Key West, Florida—denying appellant his due process. The district court placed an unwarranted burden on this indigent appellant to appear at a remote hearing location. Even if he were actually notified of those hearings he could not have appeared without extreme burden. Disobeyance of an order implies notice of such an order—and willful refusal to obey. Neither occurred in the instant case, and the district court erred in so finding. In addition, appellant challenges the notion that failure to appear at the 2 hearings violated orders of the district court. No such orders were rendered. The district court's "NOTICE OF HEARING" did not inform and warn this *pro se* appellant he was ordered to appear, as does a summons or subpoena.

The district court erroneously found that appellant failed to respond in a timely manner to its order to show cause for not appearing at the first noticed hearing. The district court has confused 'service' with 'filing.' Appellant was not ordered to 'file' a response within 5 days, he was orderd to 'serve' such a response. Appellant 'served' his response by regular U.S. mail on the same day he received the order—4 days after it was signed. The U.S. postal date stamp on the envelope which the district court possesses irrefutably demonstrates he served a timely response. In addition, his response showed good cause for not appearing at the hearing.

The district court clearly erred when it found appellant has a propensity to disobey its orders. He has neither willfully or knowingly refused to obey a district court order. The record clearly shows appellant obeyed several orders of the district court. Therefore, contrary to district court findings, he necessarily made 'efforts' to comply with orders. The district court finding that appellant has a propensity to disobey court orders, conversely implies he made efforts to comply with some court orders—thus making either the 'effort' finding or the 'propensity' finding, clearly erroneous. Take your pick. A superficial examination of the record shows both findings to be clearly erroneous.

The district court abused its discretion when it repeatedly required appellant to 'justify' his complaint, i.e. demonstrate merit for his claims—before the court allowed the claims to be defined, before the claims were answered by the appellees, and before issues were joined prior to his complaint being accepted by the district court and answered by the appellees, prior to commencement of discovery, and prior to a single issue being joined.

Regarding appellant's address. There is no local rule regarding address changes. Appellant notified the district court of his address change at the first opportunity that he was aware of that he could do so. The district court finding that he never notified the court of his address change is on its face clearly erroneous.

Furthermore, the district court clearly erred in its finding that appellant lied about his address and lied about receiving notice of hearing at his home address. Those findings are based on clearly erroneous findings vis-à-vis the district court's own mailing procedures, and U.S. Postal Service mailing procedures. More specifically, (a) the district court sometimes capriciously delays service of its own notices and orders—sometimes weeks after being signed, and (b) certified U.S. Mail does not certify location of receipt, let alone the receiver. It was an abuse of discretion to make unfounded assumptions regarding mailing procedures and deduce therefrom that appellant lied about his address and receipt of notice of hearing.

The district court finding that appellant used venomous rhetoric and vitriolic dialogue in virtually every paper he filed is clearly erroneous. The district court itself only discusses one paper wherein it finds the language used by appellant objectionable. Furthermore, appellant asserts the particular language objected to by the district court is not venomous or vitriolic when judged by community standards. The district court is apparently overly sensitive and believes reverence for its own opinions outweighs appellant's Constitutional right to express contrary opinions. The district court abused its discretion when it adjudicated appellant's claims to be devoid of merit—as a consequence of appellant expressing opinions which offend the sensibilities of the court.

Appellant did not fail to prosecute. The record shows he carried the action forward with very little delay. Just 60 days prior to dismissal appellant made three filings with the court. He might have failed to comply with two alleged orders of the

court to attend hearings, but unwillfully and unknowingly. Appellant expressed his desire to attend hearings. He could not attend due to the extremely burdensome location of venue in Miami, 150 miles distant from where the action arose, where nearly all defendants reside, and where local federal rule requires proceedings—at the Key West branch of this Florida Southern District Court. The district court itself obstructed appellant from appearing at those hearings.

Contrary to district court opinion, it did not describe in detail to appellant, the specific contents required of a complaint. Albeit the issue is irrelevant, since the court is not required to do so. The more important issue is that the district court erred in finding appellant did not provide sufficient specific detail in his initial 20 page complaint against 17 appellees. There was adequate detail for the defendants to understand what was claimed and answer those claims if they had met their legal duty to be familiar with the prior record. They as much as admitted the complaint fairly apprised them of the claims and grounds for relief by the very fact they asserted by motion, all claims therein were barred by res judicata and collateral estoppel. Logically they have conceded fair notice and appellant's argument to that effect fell on deaf ears at the district court.

Nevertheless, pursuant to district court order, appellant went forward and prepared a far more specific 500 page amended complaint. Rather than risk underestimating the level of detail required and in so doing disobeying the court's order, appellant was much more detailed. The district court then found the amended complaint not short and plain enough. This *pro se* appellant who has never seen a judicial complaint before was caught on the horns of a dilemma. He was allowed only two guesses at the perfect level of specificity which will suit the whim and fancy of the district court.

The district court also erroneously required appellant to file specific claims against specific defendants. The reason the order is erroneous is because this complaint alleges the defendants are individually liable for the acts of the board of trustees and officers as a whole. Therefore redundant claims against specific defendants are not necessary and serve only to unnecessarily lengthen and confuse the complaint. Nevertheless, appellant went forward and claimed redundantly against each individual defendant in the amended complaint, unnecessarily escalating the length of the complaint. The district court's own order for more specificity is the major reason why

the 20 page very succinct initial complaint ballooned to 500 pages in the amended complaint.

The appellant stopped short however of the district courts admonition to detail the specific elements required to substantiate each of his 168 individual claims. The federal rules require a plaintiff to state facts necessary upon which relief may be granted and to which defendants can fairly respond. When the district court admonished this *pro se* plaintiff to specifically list the elements necessary for proving each claim, within his 'notice pleading,' at the inception of his lawsuit, that was an abuse of the district court's discretion.

The district court erred when it found appellant's 500 page amended complaint violated Rule 8. The "short and plain" provision of Rule 8(a) explicitly addresses 'claims' not 'complaints.' Although the amended complaint is necessarily long pursuant to district court order for heightened specificity, the individual claims are short and plain, simple, concise, and direct, in accordance with Rule 8. The district court abused its discretion when it decreed the 'complaint' violated Rule 8(a) without reviewing any of the individual claims therein—judging the book by its cover so to speak. The district court abused its discretion by denying appellant his due process rights under Rule 18(a) to state as many claims as he has, and to have each claim reviewed on its own merits.

The amended complaint is specific and detailed, yet does not include irrelevant or immaterial facts. It presents no evidence. It is well pleaded without being suppositious, conclusory, or ultimate. Defendants were fairly apprised of the facts and grounds for relief. The district court ordered defendants to answer the amended complaint but they did not. If the district court or defendants deemed individual claims or clauses therein should be stricken, they should have acted to do so. The district court abused its discretion by dismissing the entire complaint without reviewing any of the individual claims.

Main Argument

The district court found appellant failed to prosecute in both of the usual senses for which Fed.R.App.P. Rule 41(b) authorizes involuntary dismissal: (1) he failed to diligently carry the action forward, and (2) he disobeyed orders of the district court. The magistrate's report and recommendation adopted in toto by the district court judge as the district court

opinion and reasons for dismissing the case, includes the following language:

> "It appears that plaintiff has a propensity to fail to comply with orders of the court. Plaintiff failed to appear at the first hearing on the propriety of allowing the amended complaint to stand, failed to timely comply with this court's order to show cause of December 4, 1995, failed to comply with this court's order denying the motion to change venue, and finally did not appear after Judge Highsmith affirmed this court.
>
> It therefore appears that plaintiff's complaint is ripe for dismissal for lack of prosecution. * * * This court respectfully recommends that this case be dismissed for lack of prosecution and/or as sanctions for failure of the plaintiff to make any effort to comply with orders of this court and/or to justify the existence of this complaint. In the event that the court chooses not to dismiss the case on this basis, it is secondarily recommended that the complaint be dismissed without prejudice..."

In summary, the 4 orders allegedly disobeyed are:

[1] an order commanding appellant to appear at a hearing on November 30, 1995 in Miami.

[2] an order commanding appellant to "comply with this court's order denying the motion to change venue."

[3] an order commanding appellant to appear at a hearing on February 8, 1996 in Miami.

[4] an order commanding appellant to timely show cause why this case should not be dismissed and/or he be sanctioned for failure to appear at the November 30, 1995 hearing in Miami.

First appellant dismisses item 2. There was no order commanding appellant to "comply with this court's order denying the motion to change venue." What there was is an order on February 7, 1996 which: "ordered and adjudged that the Order Denying Change of Venue is Affirmed." The district judge in that order affirmed the magistrate's order denying a change of venue. He did not issue a command to appellant. Logically, one cannot disobey an order that does not command one to do or not do something. The district court

opinion in this part is clearly erroneous. What this appears to be is a confused attempt to recast appellant's failure appear at the rescheduled hearing as another order disobeyed. The direct issue is appellant's failure to appear at the two hearings.

Failure to Appear at Hearing on November 30th, 1996

The district court opinion states appellant failed to obey an order on November 16, 1995, commanding him to appear at a hearing on November 30, 1995, in Miami. Appellant has not yet received that alleged order. He therefore cannot fairly assess whether or not the "NOTICE OF HEARING" contains language ordering him to appear at a hearing. Appellant served the district court notice on December 8, 1995, that he had not yet received that alleged order, in his "Order To Show Cause, Appellant's Response." The district court has not yet effectively served appellant a copy of that alleged order. Appellant cannot fairly respond to an order which he has never seen. Appellant would have examined the alleged order at the office of the district court clerk, were it not an excessive burden to do so—150 miles from appellants domicile. If the venue of this case and the record was at the Key West federal court house as federal rule prescribes, appellant would have fair and reasonable access to the record to assess that alleged order.

Assuming arguendo, appellant had been notified of the scheduled hearing prior to its occurrence, appellant raises the issue of whether the "NOTICE OF HEARING" was in fact an order from the district court commanding appellant to appear at the hearing.

Without a copy of that order to precisely assess, appellant can only assume it was substantially identical to the subsequently rescheduled "NOTICE OF HEARING." Appellant can identify no language therein which would fairly apprise a common layman as this *pro se* appellant, that he is being ordered to appear anywhere. On the contrary, a "hearing" is commonly understood among the citizenry to be a voluntary opportunity at which someone can voice their views regarding some pending issue. Although citizens may be ordered to appear at a hearing, the commonly understood instrument for compelling appearance is a subpoena. A subpoena informs one in no uncertain terms that he is 'ordered' to appear at a hearing. Appellant can find no language in the "NOTICE OF

HEARING" served to him that in any way commands or orders his appearance. Assuming the initial notice of hearing is substantially the same as the rescheduled notice of hearing, appellant asserts he did not disobey a district court order to appear at a hearing, because the district court made no such order.

The magistrate posed princely magnanimity by noting that he "declined to proceed with the hearing in appellant's absence, though [he] was not required to do so." Nonsense. The magistrate hides an iron hand in a velvet glove. Appellant on the contrary wishes the magistrate had gone forth with the hearing in his absence. For appellant's non-appearance is deemed by the district court as sufficient reason to sanction the appellant. Whereas if the hearing had gone forth, at worst, the complaint would stand and be judged on its own merits in accord with the rules—which is all appellant has been seeking—and so far denied. Be that as it may, appellant was and is wholeheartedly willing to appear at hearings to defend his cause.

Did Appellant Lie About Getting The Notice Of Hearing?

The district court opinion also indicates that appellant *lied* about not receiving notice of the hearing, *lied* about his true address, and failed to notify the court of his address change. These are serious findings which ascribe bad faith to appellant, prejudice his cause, and warrant his defense.

The district court based its dismissal in part on its finding that appellant lied when he stated he did not receive notice of the hearing scheduled for November 30th. The opinion recounted that appellant alleges he: "had not received the Notice of Hearing" because he "allegedly no longer received mail at the address which is on file in the court record, but rather now has a post office box."

The district court also dismissed appellant's case in part as a sanction "imposed for his failure to notice the court of his new address and causing the court and defense counsel to appear for a "non-hearing," and described appellant's "neglect and failure to notify the court of an alleged address change." The district court finding appellant failed to notice the court of his address is a half-truth which misrepresents the facts. Taken strictly literally, the district court opinion that appellant failed "to notice the court of his new address" is clearly erro-

neous. Appellant did notice the court of his new address. Else how could the court even know he has a new address? Is appellant niggling here? No. The record irrefutably shows appellant noticed the court of his new address on December 8, 1995 in his "Order to Show Cause, Appellant's Response." The district court unfairly misrepresents the fact. What appellant did NOT do was notify the court of his new address as *promptly* as the court apparently desires such notice. The court informs appellant of this desire ex post facto—after the fact.

There is no applicable federal rule which informs appellant he must notify the court upon a change of his place of residence or direct mailing address. There is no applicable federal rule which informs appellant at what particular time, by what legal instrument, and who shall be noticed, when he has a change of address. Some other federal districts and circuits apparently have such a rule.

Nor is there any federal rule describing what constitutes a satisfactory address. The district court clearly expressed its disapproval of appellant's post office box address[12], which is necessary due to his relatively impoverished financial circumstances. For most of the last year and a half he has been in a sense homeless—living as he does in his small pick-up truck. There is no law which says appellant must have a street address to seek redress in a United States Court. Fourteenth Amendment due process is not limited to those with a street address. The common man understands not all people have a fixed street address. If the U.S. federal judicial system does not, it is out of touch with the understanding of the common man.

The district court opinion found that appellant was negligent in not notifying the court of his address change. Appellant was not. He did not think it likely under the circumstances that mail sent to him would fail to be forwarded to his post office box or be lost in the mail, which is apparently what happend to the first notice of hearing. The district court nevertheless somehow imagined that appellant offered as cause for not appearing at the hearing "his neglect and failure to notify the court of an alleged address change." No such

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[12] As the district court stated in its opinion, the fact that plaintiff "no longer has a street address * * * leaves more questions unanswered than it answers."

cause was tendered by appellant. Appellant did not say he "neglected" or "failed" to notify the court of his address change. In the Order to Show Cause, Appellant's Response, appellant neither used "neglect" or "fail," nor any synonym or derivative thereof. The district court is clearly erroneous in declaring that fact.

What appellant did say was that he had established prior to the time the hearing notice was sent, a U.S. Post Office change of address request, which was successfully forwarding mail to his new Post Office box mailing address. Appellant stated he did "not know why the Notice of Hearing was not redirected to the new address." If there was any neglect or failure it was on the part of the U.S. Post Office not appellant. Appellant did notify the court of his new mailing address at the first opportunity he was aware of. Furthermore, at no time has the district court ever had an invalid or ineffective mailing address for the appellant. Nothing appellant did regarding his address was either improper or violated any applicable federal court rules.

The district court opinion finds that on November 30, 1995, the magistrate and appellee attorneys appeared but could not go forward "As a result of appellant's failure to notify the Court of his change of address." This is clearly erroneous in the first place because appellant would not have appeared even if he were in fact notified of any hearing in Miami. Secondly, the hearing notice was sent to an ordinarily valid and effective address of the appellant. Appellant was not notified of the hearing due to a postal failure, not a failure of appellant to notify anyone of his change of address.

The district court purportedly sent the notice of hearing to appellant's home address on November 16, 1995, via First Class U.S. Mail. If the U.S. Postal Service had worked as appellant had good reason to expect, the alleged order would have been re-directed to his new address with little or no delay. Appellant does not know why the notice of hearing was not delivered to him. Appellant did not intend, nor could he reasonably foresee, the notice would be lost in the mail.

Appellant did apprise the district court at his first opportunity, on December 8, 1995, that he had changed his mailing address to a post office box. He did not notify the district court immediately upon his change of address for two primary reasons. First, appellant was very abruptly informed he had to immediately move from his home address—the home he had lived in for more than 8 years. Consequently, he was ex-

tremely busy and focused on immediately relocating his possessions, handling utilities such as electricity and telephone, making arrangements for somewhere to go, and so forth. He immediately established a U.S. Post Office change of address which he reasonably expected would redirect all of his incoming mail to his post office box. For the most part it did and still does redirect his mail.

Amidst an extremely frenzied and chaotic temporary period in appellant's life, he reasonably had his mail forwarded to his post office box and waited for the next opportunity by which he believed he was allowed to communicate with the court, such as the next motion or response, to inform the court of his new address. At the time appellant changed his address, he was unaware of the legal mechanism available to him for informing the court of his change of address. Appellant quickly scanned the Federal Rules during that stressful period and saw a Florida Southern District Rule 7.7 entitled "Correspondence to the Court." Rule 7.7 says in pertinent part,

Unless invited or directed by the presiding judge, attorneys and any party represented by an attorney shall not: (a) address or present to the Court in the form of a letter or the like any application requesting relief in any form, citing authorities, or presenting arguments: and (b) shall not furnish the Court with copies of correspondence between or among counsel, or any party represented by an attorney.

This rule reasonably appeared to this *pro se* non-lawyer appellant, to prohibit him from sending any letters other than motions and other papers explicitly designated in the rules, to the court unless invited by the judge. To an experienced lawyer it might be understood 'correspondence' does not include a change of address notice, but to this *pro se* appellant who is wary of violating a rule, subjecting his cause to dismissal, it was reasonable to rely on the Post Office to redirect his mail to him, and wait to apprise the court of his new address at the next filing of a formal paper such as a motion or response.

In addition to Rule 7.7, which appeared to prohibit general correspondence with the court, appellant could not find any federal rule which prescribed that upon a change of address, a litigant must immediately notify the court. Common sense would lead anyone to know that if the court didn't have an adequate mailing address it couldn't mail anything to the appellant. However, the court at all times during this case has pos-

sessed a valid and reasonably effective mailing address for the appellant.

At this later date, having now had more time to research the change of address issue, appellant now appreciates the wisdom of local rules in some other federal districts which explicitly direct litigants to notify the court when their address changes. Obviously a rule cannot be anticipated for every circumstance, but this address change issue is apparently not very novel. If the Florida Southern District had promulgated such a rule appellant would have discovered and employed that rule. All he saw was a rule warning him NOT to correspond with the court.

In hindsight, if the district court wished to obtain reasonable assurance the notice of hearing was delivered and a hearing would go forward with all litigants present, it could have sent the notice by certified mail, by registered mail, or via personal service. It did not. Appellant points out that each time the district court has served papers to him via certified mail, which costs only one dollar, that mail was effectively delivered to appellant. One dollar could have saved hundreds, perhaps thousands of dollars which the district court, the appellees, and now the appellate court, have needlessly wasted on this matter.

If appellant truly had bad faith in this matter, he could have easily lied and said he mailed the magistrate notice of his change of address, and that it must have been lost in the mail. The court could never prove otherwise. However, he did not make that easily justifiable excuse, because what appellant actually did <u>was</u> perfectly justified. He notified the court of his new address at what he perceived was his first reasonable opportunity to do so. He was not trying to evade service. The fact that the district court with its next mailing was able to serve him effectively demonstrates this to be true. The district court mailed its order to show cause for not appearing at the hearing—by 'certified' U.S. Mail to both his (former) home address, and to his post office address—which it found on an earlier mailed envelope. Neither was lost in the mail. What we have here is simply an innocent snafu, miscommunication, and misunderstanding. There was no prejudice to the substantial rights of the appellees.

Did Appellant Fail to Timely Show Cause?

The next reason in the opinion of district court for dismissing the complaint, is that appellant failed to obey the court's order to *timely* show cause for failure to appear at the initial hearing. More specifically, the district court states in its opinion that the magistrate commanded appellant on December 4, 1995, to respond within 5 days to an order to show cause; that certified mail/return receipt shows appellant received the order to show cause on December 8th, four days after it was signed by the magistrate; and in contravention to that order appellant's response "was not filed with the court until January 2, 1996," nearly a month after the order was signed by the magistrate.

Appellant received that order by certified mail 4 days after it was signed. Whereas he was given only 5 days to respond, with 4 days already passed when he received the order on December 8th, he hastily prepared a short response and served it by First Class U.S. Mail on the very same day he received the order—December 8, 1995. Appellant attached a certified oath attesting to service on that day. Copies also were mailed by First Class U.S. Mail and certified on the same December 8th to appellees' attorneys. Why the response was not filed by the court for nearly a month after it was served is unknown to appellant. Obviously it was served during the winter holiday season. The cause may have been slow delivery by the U.S. Post Office, delays due to court staff on holiday, other holiday related delays, or a combination thereof.

A examination of case law on filings reveals that judicial personnel do not always file a document when it is received by them. Appellant is not in a position to know what happened to his response after it was mailed. If the response was not 'filed' at the court until January 2, 1996, nearly a month after is was served, that is irrelevant. The federal rules of civil procedure call for service within 5 plus 3 days if by U.S. Mail, as in this instance.

The order to show cause did not command 'filing' at the court within 5 days, it: "ORDERED AND ADJUDGED that appellant shall have five (5) days from the date of this order to show cause." While this order does not specifically state 'service' within 5 days, appellant asserts by default it commands 'service' not 'filing.' To hold otherwise would be an abuse of discretion given the practical realities in turnaround time from court service to litigant's responsive filing.

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Nonetheless, the district court carps on the delayed delivery as if the conduct of its judicial business was so severely obstructed and appellees so severely prejudiced—during the holidays—by deliberate dilatory action on the part of the appellant, that the harsh sanction of dismissal with prejudice is warranted. "The gravity of the fault must be compared with the gravity of the hardship."—Cardozo: Graf v. Hope Bldg. Corp., 254 N.Y. 1, 13. The fact is, appellant responded immediately to that order[13].

Appellant pointed the court to evidence which clearly establishes the truth that he served that response to show cause the very day he got order. The district court has the envelope upon which the U.S. Postal Service stamped December 8th. The appellee's attorneys have similarly stamped envelopes showing appellant timely served a response, but their zeal to win this case suppresses their ethical duty to forthrightly attest to that timely service. The truth cries out for recognition. However, as Winston Churchill once said: "Men occasionally stumble over the truth, but most of them pick themselves up and hurry off as if nothing had happened."

Before closing this issue it should be understood that when the district court did eventually file appellant's response to the order to show cause, the court opines he offered no good cause for failure to appear at the initial hearing, that the Miami venue is proper, and moreover, that appellant lied about not receiving notice of the hearing.

Did Appellant Lie About His Address?

The district court also based its dismissal in part on its opinion that appellant lied about his address, stating that he: "allegedly no longer received mail at the address which is on file in the court record." Although appellant was never given an opportunity before his complaint was summarily dismissed, he can prove irrefutably that he was not living at or receiving mail at the street address where the district court served a notice of hearing and order to show cause. That address is a

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[13] Which was quite burdensome given that appellant had to compose, print, and package multiple copies of that response from behind the steering wheel of the pick-up truck in which he lives, shivering in the winter cold with his fingers numb. It is not enough for the district court to force appellant to run a summary legal gauntlet with a ball and chain, the court stands there with a stop watch, seeking any opportunity to find the slightest fault.

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condominium which was rented and occupied by someone else at the time.

Appellant informed the district court he "no longer has a street address and therefore the post office address will have to suffice." In the district court's opinion, this response "leaves more questions unanswered than it answers." The district court never asked those questions and instead, jumped to the conclusion appellant was prevaricating on his address.

Appellant's response is the short and plain truth regarding his address. The court suspects a bug under the chip because of its clearly erroneous prejudice that all people live at locations which have a fixed street address, such as a house or apartment. "Practical adjustments, rather than a rigid formula, are necessary."—William O. Douglas: Consolidated Rock Prod. Co. v. Du Bois, 312 U.S. 510, 529. As Aristotle recognized many centuries ago in his *Politics*, the law is often the expression of the will of a particular class. "Laws grind the poor, and rich men rule the law." Oliver Goldsmith—*The Traveller*.

The district court opinion explicates a superficially plausible rationale which it concludes shows that appellant still received mail at the street address on file at the court and that he therefore lied about his address and lied about not receiving notice of the hearing:

The order to show cause sent out by the court on December 4, 1995 was sent certified mail, return receipt requested. It was sent both to the address of record in the court file as well as the P.O. Box * * * certified mail/return receipt's indicate that appellant received the order to show cause (at two different addresses) on December 8th and December 11th, 1995 * * * to the [street] address of record in the court file as well as the P.O. Box, and yet appellant alleged he "no longer received mail at the [street] address." * * * In light of the fact that "the appellant no longer has a street address" this court wonders how he could have signed for mail on December 8, 1995 at the very [street] address in the court file. Perhaps, appellant would suggest, that mail was forwarded to his post office box. If that were so, however, how did it get there three days before the item sent directly to his post office box (which he signed for 3 days later)?

The copy sent to appellant's former street address (the condominium) was in fact forwarded by the U.S. Post Office to appellant's post office box due to the change of address he had instituted with the post office. Although appellant's for-

mer street address may have been on the certified receipt, addresses on such a receipt are not placed there by the post office or by the recipient. They are placed there by the sender and do not reflect the location of receipt. They reflect the location to which mail was sent, not delivered. U.S. Certified Mail merely certifies the mail was delivered to somebody on a particular date, but does not certify delivery to a specific person at a specific location. A postal clerk has no idea who you are or where you got the certified notice. Anyone who has ever retrieved certified mail knows that. Apparently the district court has minions who insulate it from knowledge of such menial chores. If U.S. Postal Service Certified Mail were positive proof of service the federal rules would allow its use for service of subpoenas and summons. Apparently is was tried many years ago and proved clearly unreliable.

The district court's reasoning, though superficially plausible, is also built upon sand in other respects as well. It is based upon a clearly erroneous factual finding that it mailed two copies of the order on December 4th. The district court has a propensity towards confusing the date it signs an order, with the date it 'serves' that order. Appellant possesses positive proof in the form of a date stamped envelope from the district court, which shows the court mailed the second copy of the order four days later—not the same day—on December 8th, to appellant's post office box. Appellant received that second certified copy 10 days later on December 18th. The district court's own certified receipt should have been examined by the district court, showing the date of 'service', rather than the date it signed the order. Both orders were signed but not served the same day. Appellant notified the district court of this positive proof. The district court clearly erred when it ignored that evidence within its own hands, and that was an abuse of discretion, since dismissal was in part based on a finding that appellant lied about his address and receipt of notice.

Appellant possesses several other envelopes which clearly demonstrate the district court has a propensity towards signing orders, and then serving them via mail several days and sometimes weeks later, while at the same time holding appellant responsible for responding to those orders in a timely fashion—based on date of signature rather than date of service. For instance: the magistrate signed his recommendation to dismiss the case on February 13th but the postal date stamped on the envelope shows it was mailed 8 days later. Another example:

on March 6, 1996 the district court signed an order dismissing this case. The district court posted that order in the U.S. Mail 15 days after it was signed. Appellant received that notice 20 days after is was signed. Appellant has 30 days after a final order to appeal but he in actual effect was only given 10 days. The district court's opinion criticizing appellant for untimely serving a response to its order to show cause was clearly erroneous, while at the same time untimely serving its own orders—often placing appellant in jeopardy of untimely response—was a Pecksniffian abuse of discretion.

Failure to Appear at Hearing on February 8th, 1996

The district court also dismissed appellant's case because it opined that appellant failed to obey an order on January 3, 1996, commanding him to appear at a hearing on February 8, 1996, in Miami. The purpose of the hearing was to determine if "the amended complaint should be stricken for failure to comply with Fed.R.Civ.P. 8(a)" and whether "sanctions should be imposed for his failure to notice the court of his new address and causing the court and defense counsel to appear for a "non-hearing" on November 30, 1995."

Appellant responds in the first place, the alleged order which appellant received is entitled "NOTICE OF HEARING," not entitled "ORDER" as is the usual case with orders from the district court. Appellant challenges the notion this hearing notice, orders appellant to attend the hearing, and by his failure to appear at it, he has disobeyed such an order. There is no language within that alleged order which informs appellant he is by that instrument, "ordered" to attend the hearing noticed therein. For instance, there are no words such as "subpoena" or "commanded" or "ordered to appear" or "shall appear" present in the notice. If there exists some Federal rule which commands parties to attend hearings noticed by a district court, appellant is unaware of it, and the district court did not cite such authority. Consequently, appellant asserts he did not disobey a court order by failing to attend the hearing of February 8, 1996, because there was no such order.

Next, assuming *arguendo* the notice of hearing was an order for appellant to appear on February 8, 1996, appellant responds he moved to stay that hearing and received notice of the "affirmation" of that order, on February 13th—five days

after the actual hearing. That notice was served by regular U.S. Mail the day before the scheduled hearing, and any reasonable person should have anticipated that appellant would not receive notice of the affirmation of the hearing until after it had already occurred. The district court may believe appellant should have assumed the hearing would not be stayed, but that would be a subtlety of law a layman such as this appellant cannot be expected to know.

It takes a pretty jaundiced eye not to see appellant was unfairly put in a box by notifying him five days after the hearing that it was not stayed. Logically, one must wonder why such *pro forma* notice was even served, if the court already assumes appellant does not need such service to be apprised the hearing was not stayed?

In the final analysis, appellant forthrightly adds that even if he had been notified a week in advance that the hearing was not stayed, he would not have appeared. For he did not have financial wherewithal to get there. If the district court had not transferred the case to a remote venue in Miami, appellant would have appeared to defend his complaint. Appellant's failure to appear at the hearings was caused by the court's own failure to follow the federal rules and give appellant his due process vis-à-vis the proper venue.

Nonetheless, appearance at a hearing is not necessary to carry on an action, i.e. prosecute at the notice pleading stage of this civil action. For at least two reasons: (1) appellant's notice pleading can stand on its own; and (2) the district court had practical alternatives to appellant's personal appearance at the hearings, *inter alia*, telephone and video conferencing. The district court had a duty to seriously consider these alternatives prior to the harsh sanction of dismissal with prejudice. It did not. Those alternatives are discussed more specifically *infra*.

In exercising its discretion on the propriety of dismissal under Rule 41(b) Fed.R.App.P., the district court should have considered the absence of substantial prejudice to appellees as a result of the failure to appear at those hearings, the available alternatives to personal appearance, that there has been no history of dilatoriness on appellant's part, that his non-appearance was neither willful or in bad faith, the potential effectiveness of alternative sanctions, and the meritoriousness of his claims. It appears district court did not consider such factors.

Was Venue Properly Laid?

On January 3, 1996, the district court magistrate judge signed the second notice of hearing, i.e. rescheduled hearing, to be held on February 8, 1996. That notice was effectively served via certified mail to the appellant and for the first time apprised him of proceedings to be conducted in Miami—150 miles from his domicile in Key West. On Appellant being now being made aware by the notice of hearing, that the venue of proceedings seemed to be in Miami, moved on January 18th to stay the hearing and change the venue of all future proceedings of this case to the Monroe County, Key West branch of the United States District Court, Southern District of Florida, where appellant filed his complaint and proximately all appellees reside and do business. Appellant suggested alternatively that some proceedings might be conducted via conference telephone.

Appellant argued essentially: (1) the Key West federal court house is the venue at which he filed his complaint, (2) traveling 150 miles from Key West to Miami and back repeatedly for various and sundry proceedings was an extreme financial and physical burden for him, (3) onerous for the 30 plus witnesses and appellees as well, and (4) Federal Florida Southern District Court Local Rule 3.1.D. specifically says "Monroe County actions and proceedings shall be tried at Key West, Florida."

The magistrate denied the motion immediately on January 24th, albeit "not precluding the possibility that some of the proceedings might take place in Key West." The magistrate expressed essentially 6 reasons for denying the change of venue:

(1) there is no federal judge or magistrate who regularly sits in Key West;
(2) judges and magistrates are routinely randomly assigned throughout a wide undifferentiated district;
(3) the location of proceedings within the district depends upon which judge or magistrate was randomly chosen;
(4) it is not at all unusual for cases to be handled, and even tried, in places that are not the most convenient;
(5) given the nature of these proceedings the court finds it would be far more expensive and disruptive to hold every hearing in Key West;

(6) the district court does not have the facilities to accommodate a telephone hearing, given the number of parties involved.

Appellant immediately served an appeal to the district judge on February 4th, who immediately thereafter on February 7th, affirmed the magistrate's order denying a change of venue. The next day, on February 8th, the magistrate and appellees' attorneys appeared for the rescheduled hearing, but appellant did not. On February 13th *five days after the hearing*, appellant received notice: (1) the hearing would go forth in Miami on the 8th, (2) the Miami venue was affirmed by the district judge on February 7th, and (3) the magistrate had recommended the complaint be dismissed and appellant sanctioned for *inter alia*, not appearing at the two scheduled hearings.

Some background information on the federal district may be helpful to an understanding of the issue. Appellant isn't privy to much about how the district court functions but appellant has gleaned some information from the promulgated federal rules and visited the local federal court house once or twice. The U.S. Florida Southern District stretches from Key West up to West Palm Beach, Florida. The court clerk maintains four staffed offices open to the public, one of which is at 301 Simonton Street, Key West, FL 33040, (305) 296-4947. Local Rule 3.4.D. describes a Southern District which is divided into *northern* and *southern* divisions, with judges assigned to *either* one or the other division. In other words, local rule delimits assignment of judges to one of the two divisions. The Miami and Key West judicial branch offices are in the southern division. The Key West branch is located in a grandeur (for Key West) federal building in the "old town" section, which per square foot is some of the most expensive real estate in Florida. In the foyer, federal judges name's with their room and floor locations are listed on the wall. Ostensibly, federal judges conduct proceedings there.

Rule 77 (b) Fed.R.App.P. restricts proceedings to a federal district unless consent is given by all the parties affected. Local district court Rule 3.1.D. narrows Rule 77 (b) by prescribing "Monroe County actions and proceedings shall be tried at Key West, Florida." Whereas Rule 77(b) is particularized by Local Rule 3.1.D., delimiting proceedings to Key West in the instant case, and whereas Rule 77(b) requires the consent of all parties to hold proceedings outside the district, appellant asserts Rule 77(b) imbues Rule 3.1.D. with a restriction

against proceedings outside Key West unless appellant agrees to them. He does not so agree.

In a broader context regarding the venue issue, 28 USC §1406 provides the district court in which "is filed a case laying venue in the wrong *division* or *district* shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." In the instant case appellant's complaint was filed in the correct division—the southern division of the U.S. Florida Southern District. More particularly, it was filed at the Key West branch of the district court. Sometime thereafter, venue was improperly transferred by the district court into the Miami branch—unbeknownst to appellant and without notice to that effect given to appellant. There was only a hint venue was being transferred when upon filing his complaint, appellant received a perplexing verbal instruction by clerk staff at Key West, to file all subsequent papers with whatever judge he is assigned in Miami. Apparently, transfer to the Miami venue is routine and automatic.

The district court stated in its opinion that the Southern District stretches from Key West up to West Palm Beach and the location of proceedings within the district depends upon which judge or magistrate was randomly chosen; therefore "it is not at all unusual for cases to be handled, and even tried, in places that are not the most convenient." The opinion implies that judges and magistrates are routinely randomly assigned throughout a wide undifferentiated district. That procedural practice is inconsistent with local rule 3.4.D., which describes a Southern District divided into northern and southern "Divisions," with judges assigned to *either* one or the other *division*.

The district court denied the change of venue, *inter alia*, because no Federal judge or magistrate sits *regularly* or *full-time* in Key West. The salient point implied in that statement is that Federal judges and magistrates do conduct proceedings in Key West. Which begs the question, how and when are they assigned to Key West? Is it done randomly as the district court explains? If so, then why did appellant's case get transferred to Miami immediately upon filing, before a judge was even assigned? This response 'leaves more questions unanswered than it answers.'

In any event, appellant does not believe random assignment (which presumably serves the appearance of impartiality) and proceedings held in Key West, are mutually exclu-

sive—if in accordance with the federal rules, judges in the southern division of the southern district are assigned randomly to Key West. Apparently they are not.

The district court also acknowledged that the *district judge* determines the venue of the trial—not any existing procedural rule or law—such as rule 3.1.D. The magistrate judge stating the official opinion of the court in his Report and Recommendation said that he would "defer to the District Judge regarding the venue of the trial, if and when that decision need be made." In other words, venue in this district is a matter of judicial discretion, not a matter of procedural rule, law, and due process.

The district court's opinion further states: "It is true, * * * that Local Rule * * * indicates that actions and proceedings shall be tried at Key West," [the court's own emphasis] however, the court adds "given the nature of these proceedings the court finds it would be far more expensive and disruptive to hold every hearing in Key West."

The district court implies by its underscored emphasis in the opinion, that the local rule prescribes only the "trial" be in Key West; that the local rule does not apply to hearings or other proceedings. Appellant asserts the plain language of this local rule applies to hearings as well as the trial. The word 'proceeding' is inclusive of 'hearing' and 'trial.' 'Proceeding' includes all the steps or measures adopted in the prosecution or defense of an action. Statter v. United States, C.C.A.Alaska, F.2d 819, 822. The term 'tried' means to examine and investigate a controversy; to examine and determine judicially. Its scope is not limited to 'trials'. 'Tried' in this rule applies to 'hearings' too.

The plain and simple language of this rule makes it abundantly clear what is intended. This is reinforced by what the rule does NOT say. "The sentence is as significant for what it omits as for what it says."—Cardozo: Moskowitz v. Marrow, 251 N.Y. 380, 397. It does not say the "trial shall be in Key West, and other proceedings within the Southern District (or the southern division thereof)." If it were the intent of the rule to limit only the trial to Key West it could quite easily and unequivocally have done so. "Argument can hardly make the intent of the statute clearer."—Homes: Robertson v. Gordon, 226 U.S. 311, 316. The district court cavalierly construes the clear meaning of the rule to suit its own conveniece, like Humpty Dumpty:

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean — neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master — that's all." Through the Looking Glass, Lewis Carroll.

And in the compelling words of Justice Oliver Wendell Holmes: "Whatever the consequences, we must accept the plain meaning of plain words." United States v. Brown, 206 U.S. 240, 244. The spirit which vivifies this rule—actions arising in Monroe County shall conduct their proceedings in Key West—is as quite clear.

This local rule 3.1.D. defines a promulgated Federal judicial district procedure and due process right. As such, absent exceptional circumstances, it should be followed by this district court. Logically, this is another example of prevarication on the part of the district court. At one and the same time the district court says the 'judge' shall determine the venue of the trial, implying it might not be Key West, and then also construing rule 3.1.D. as prescribing only the 'trial' shall be in Key West. Whim and caprice are rife in this dismissal—the essence of abuse of discretion.

This district court's actions need to conform with the law. "We citizens cannot act in accordance or pursuant to law if we cannot predict what the 'the courts will do in fact.'" as O. W. Holmes, Jr. said in The Path of the Law (Harvard Law Review, Vol. 10, 1896, 457-478). The federal rules should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations. They must be given their plain meaning. It is not the province of a district court to modify, revise or disregard the plain terms of a rule for its guidance which superior courts presume will be followed. In the famous language of the Massachusetts Bill of Rights, we must have a "government of laws and not of men."

"It is difficult to over estimate the importance of procedure," noted Justice William O' Douglass, pointing out that most of the provisions of the Bill of Rights are procedural. "It is procedure," he wrote,

> that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under the law. * * * The

> power of the individual is no match for the power of the government unless the individual has guarantees he will be treated fairly. * * * It is basically the community's assurance that prosecutors, judges and juries will behave properly, with rules distilled from long centuries of concrete experience.

Case law is replete with examples of litigant's pleas for relief dismissed for failure to comply with the federal rules—what's good for goose is good for gander. Appellant here simply pleads for steadfast adherence by the district court to the procedural safeguard in local rule 3.1.D.

Next we turn to issues of weighing the burdens and balance of court versus plaintiff's convenience, plaintiff's right to seek redress in a *local* federal court, and the appearance of impropriety. The actions being litigated occurred proximate to Key West; with one minor exception: the alleged fraud of attorneys engaged in representing defendants from Key West. The forum chosen by appellant—Key West, is the situs of operative fact and location of substantially all relevant documents and witnesses.

All but 3 of the 18 litigants in this case reside in the Florida Keys and mostly in Key West. The 3 exceptions are Miami attorneys who are agents of the principal defendants in this case. Miami, where the district court has *sua sponte* and without notice transferred venue, is approximately 150 miles from Key West. Travel time by automobile to Miami from Key West generally takes 3 or more hours, depending on traffic along the predominantly 2 lane highway up through the Florida Keys; especially during the winter season when the road is congested with slow moving recreation vehicles and sightseers. Whereas appellant expects to call nearly all witnesses from the Key West area, summoning them from Key West to Miami, often more than once, would be unreasonably burdensome to them as well as to the appellant—and probably to the appellees as well.

Appellant feels that proceedings held in Miami force him to lie in a *Procrustean bed.* As Justice Frankfurter remarked in Kingsley Co. v. Regents, 360 U.S. 684, 697: "the Due Process Clause is the very antithesis of a Procrustean rule." Last year appellant received an adjusted gross income of less than $3,000. His income is no better this year. He lives at subsistence level on the street in a small pick-up truck which has limited functionality, spending proximately $3 per day in to-

tal—for both food and gas. Appellant simply cannot afford to be traveling back and forth 150 miles between Miami and Key West for hearings, conferences, and other proceedings. Anyway, it makes no sense when a Federal court house is within walking distance of where this civil action arose, and where the appellant and most appellees and witnesses reside.

Formerly, appellant had the financial means to appear at remote hearings. However, due to the very injury he seeks relief for, he is without the financial means. On the contrary, the personam appellees are supported by a multimillion dollar indemnified public corporation. It is no wonder they have urged proceedings in Miami, 150 miles from their location in Key West. The reason is obvious: to deter appellant's prosecution of this case. In furtherance of this nefarious intent, appellees also tried to force appellant to appear in Miami for deposition. Appellant moved for a protective order. The district court declared the motion moot on July 24, 1995, because the date for deposition had already passed, but added: "there is, substantively, some merit to plalintiff's motion." In other words, the district court has admitted it is burdensome and inconvenient for appellant to proceed in Miami. This reveals that when the district court opined that hearings in Key West would be too 'inconvenient' and 'disruptive,' the district court was referring to itself not appellant or appellees.

If the venue stays in Miami appellant will relocate to Miami to obviate the practical impossibility to travel 150 miles back and forth from Key West. Then he will insist that the 30 plus witnesses travel back and forth from Key West to Miami. Obviously this would make no sense and be inconsistent with the intent and purpose of venue laws.

Furthermore, appellant should be able to walk over to the federal court house in Key West and examine the record of his case. The record on appeal is currently retained in Miami rather than transmitted to this appellate court "for use in preparing appellate papers," Rule 11 Fed.R.App.P. He has duties and rights regarding that record which he cannot faithfully fulfill or exercise because the record is located at a remote site 150 miles away. The record reveals appellant has repeatedly requested that appellees and the district court transmit copies of papers apparently filed at the district court, which the docket index indicates have been filed—to no avail. The district court is willing to spend hundreds of thousands and perhaps millions of dollars on Key West court operations but nothing on ensuring fair access to court records there. It

makes one wonder what the purpose of the federal court facility in Key West really is.

Are there relatively inexpensive alternatives to a hearing in Miami? Yes. The district court states that "the request to conduct hearings by telephone, while not an unreasonable one, is DENIED" because "this court does not have the facilities to accommodate a telephone hearing, given the number of parties involved." The district court here implies but for the necessary telephone conferencing facilities they would do it. Nonsense. That's an unavailing and transparent excuse serving its own convenience.

Hearings conducted by telephone are provided for in the Federal Rules of Civil Procedure, and many government agencies routinely do it. The only "facilities" necessary are a telephone. Other supporting technology is helpful but not necessary. Conference calls are quite common these days. Appellant telephone conferences with his family and relatives who live in rural Illinois. In related litigation between the college-defendant and this teacher-plaintiff, a Florida quasi-judicial body conducted what it called a 'routine' telephone hearing from Miami, in order to determine the substantive rights of this appellant.

Some courts even avail themselves of videoconferencing technology. In as much as the Key West courthouse has a computer linked to the Miami court house computer, appellant wonders why videoconferencing is not used in this remote island region as an alternative to travel? Even high school students today, are using phone-video-whiteboard conferencing systems via computer networks. Verily, every day, one can find elementary children doing so over the Internet. If the technology is too complicated for federal court information systems staff to comprehend, the court can simply go to the local Kinko's office center or similar service to do their videoconferencing. "Governmental power must be flexible and adaptive."—McKenna: Eubank v. Richmond, 226 U.S. 137, 143.

The purpose of venue laws are intended to nip problems like this in the bud. And one purpose of appellate courts is to correct district courts like this who don't strictly adhere to those procedural safeguards which protect appellants against whim and caprice. These venue laws are created precisely to alleviate an excessive travel burden on litigants. The rule has heightened strictness in cases like this where the appellant finds it especially difficult to travel that distance—the more so

when the alleged injury itself is facially the cause of that excessive burden.

"It is not enough that the doors of the temple of justice are open; it is essential that the ways of approach are kept clean."—Brewer: Hatfield v. King, 184 U.S. 162, 168. The district court has admitted it is not at all unusual for its own convenience, to ignore rule 3.1.D, i.e. to hold hearings anywhere within the Southern District regardless of litigant's convenience, to ignore the rule of law, and due process rights of litigants. "The right to resort to the courts, when exercised in good faith, shall be kept free from the menace of unknown and unknowable penalties which intimidate the suitor, and clog his liberty of action."—Cardozo: City of Yonkers v. Fed. Sug. Ref. Col., 221 N.Y. 206, 212-13. The history of government abuse like this is long—and hopefully long gone:

> [the present King of Great Britain] He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures. *Declaration of Independence.*

Our American judicial system has a long history of struggle against the tendency of government to serve its own interests rather than those of the citizens. "The natural order of things is for liberty to yield and for government to gain ground."—McKenna: Block v. Hirsh, 256 U.S. 135, 163. The term "circuit"—part of this court's very name, derives from the fact that judges at one time traveled a circuitous route to bring justice to our citizens. Now comes this district court which would have we citizens who are pleading for relief, come humbly begging for justice at its distant door.

When the Supreme Court noted that federal venue statutes are, "generalized attempts to promote the same goals of convenience and fairness;" Van Dusen v Barrack (1964) 376 US 612, 11 L Ed 2d 945, 84 SCT 805. It wasn't talking about the convenience of judges. It was talking about the due process of citizens. Appellant asks, does this district court primarily serve its own interest or the public interest? "The protection of the public interest * * * is more imperative than the despatch of judicial business." Justice Stanley Forman Reed, Insurance Gr. Comm. v. Denver & R. G. W. R.R., 329 U.S. 607, 631.

The district court opinion states: "given the nature of these proceedings the court finds it would be far more expensive and disruptive to hold every hearing in Key West." Appellant then asked, why expend the greater cost of having a federal court house and staff in Key West? The district court ignored the question. What the district court wishes to do is summarily dispose of this case rather than face the difficulty of dealing with the complex and serious issues appellant presents. A court must not let its zeal for a tidy calendar overcome its duty to do justice. See Peterson v Term Taxi, Inc. (1970, CA2 NY) 429 F2d 888.

To the extent that search for truth and justice infringes on convenience of judges, such convenience must yield. These venue rules are in the interest of the administration of justice and transcend in importance mere inconvenience to a judge. Shall the district courts of this nation be guided by the law or by their own convenience? The "purpose of adoption of these rules was broader than simplification of procedures for convenience of lawyers and judges * * * these rules were designed for the protection of a diligent litigant who has just cause...." New Amsterdam Cas. Co. v. Waller, C.A.N.C.1963, 323 F.2d 20, certiorari denied 84 S.Ct. 1124, 376 U.S. 963, 11 L.Ed.2d 981. To prevent this kind of abuse of discretion, this 3.1.D. venue rule has been reviewed and approved by this 11th Circuit, the Judicial Conference, U.S. Supreme Court, and U.S. Congress.

The venue chosen by the district court has the appearance of impropriety. Which appellant verified by querying common citizens on the street. Consider in summary:

(1) the venue rule says proceedings shall be in Key West;

(2) the pauper appellant has limited mobility and is living on the streets of Key West;

(3) the appellees are also located proximate to Key West;

(4) Key West is where the action arose and most relevant documents and witness reside;

(5) despite plentiful competent local attorneys appellees employ expensive attorneys in Miami 150 miles away;

(6) the judge requires pauper appellant to travel 150 miles to hearings; the excuse—it is too "inconvenient" to hold hearings at the federal

court house where this appellant filed his complaint in Key West;

(7) appellant moves for change of venue, the district court immediately denies it without even seeking or considering appellees views on the matter—apparently being already privy to them.

As Justice Frankfurter said in Dennis v. United States, 339 U.S. 162, 182, "The appearance of impartiality is an essential manifestation of its reality." Where a matter of judicial discretion is at issue, that appearance must be rock solid, and it is clearly not.

The common man on the street perceives these circumstances as having the appearance of impropriety. And it's a pity, because it's so easy to rectify by simply conducting the proceedings in a venue of unquestionable propriety. It's utterly shameless that a powerless *pro se* pauper plaintiff, is burdened with dragging a federal court, kicking and screaming all the way, into compliance with the rule of law and due process. The federal courts should be protecting powerless *pro se* pauper plaintiffs, not undermining their pleas for justice.

Under our constitutional system, courts stand against any winds that blow, as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.—Black: Chambers v. Florida, 309 U.S. 227, 241.

It may be said to be generally true that the weaker a party and the smaller his interest the greater the need of the strong hand of the court to ascertain and protect his rights.—Brewer: Montana Co. v. St. Louis M. & M. Co., 152 U.S. 160, 170.

The district court stated it "is not precluding the possibility that some of the proceedings might take place in Key West." This statement reinforces the fact this district court arbitrarily and for its own convenience, determines venue, in clear contravention to the rule of law. The district court states in its opinion "the plaintiff recognizes that the court has discretion as to where to hold hearings." Not so. Appellant used the terms "may" and "ultimately" and "limitations" with regards to discretion. "Discretion is never without limits."—Harlan: System Fed. v. Wright, 364 U.S. 642, 648. "The term "discretion" denotes the absence of a hard and fast rule."—Sutherland: Langnes v. Green, 282 U.S. 531, 541. In the instant case there is just such a rule. It was not put there for appearance of propriety only. Let appellant proceed as Aristotle

intoned: "by the impersonal yardstick of the laws," rather than dance to convenience and caprice of judges. As Aristotle further cautioned: "well-drawn laws should themselves define all the points they possibly can and leave as few as may be to the decision of the judges" (Rhetoric 1354a32). Rule 3.1.D. does just that. It was directed to these very judges who attempt here to circumvent it. Thankfully their actions are subject to your review.

The federal rules do not give the district court unfettered discretion, with regards to venue or any other matter under its jurisdiction. If it did there would be little need for this appellate court. The federal rules delimit discretion in this matter. When the district court exceeded those limits it has a burden to show compelling reasons for doing so. This court has not. Moreover, it provide little if any rationale for its alleged 'discretionary' action, which in reality was an arbitrary action, i.e. "without fair, solid, and substantial cause; that is without cause based upon the law...not governed by any fixed rules or standard" BLD. Violating the rule of law for convenience is hardly 'substantial cause.' It is arbitrariness masking itself as discretion. "Arbitrary methods * * * have ever appeared to me to be the great engines of judicial despotism." Hamilton #83 The Federalist Papers.

The district court once being apprised of questionable venue, should have transferred venue to Key West where there is absolutely no question venue can be properly laid. See Wade v Olympus Industries, Inc. (1988, SD NY) 695 F Supp 730. In Clayton v Swift & Co. (1955, DC Va) 132 F Supp 154, the court said that such a factor should be given great weight, thereby avoiding the delay and expense incident to litigations in a venue where it is at least doubtful. This instant case is right on point. If the district court had followed the rules rather its own convenience it would have prevented the needless waste of hundreds of hours and many thousands of dollars on this issue.

Appellant urges this appellate court to either transfer the action itself directly or mandate such. Either way is clearly supported in precedent. See Koehring Co. v Hyde Constr. Co. (1966) 382 US 362, 15 L Ed 2d 416, 86 S CT 522, reh den 383 US 939, 15 L Ed 2d 857, 86 S Ct 1062; Skil Corp. v Millers Falls Co. (CA6 Ohio) 541 F2d 554.

This appellate court could take an impactful and exemplary action by holding a hearing itself on this venue issue, as well as others in the instant case, right here in Key West at the

federal court house—to see first hand what is going on here. Appellant would welcome an opportunity walk over to the 'federal' court house and defend his just cause.

As introduced *supra*, the district court dismissed the complaint, *inter alia*, because: (1) it lacked specific claims against specific appellees, the basis for the claims and the court's jurisdiction, the specific facts giving rise to each claim, and the elements necessary to substantiate the each claim; and (2) it violates the "short and plain" requirement of Rule 8(a) Fed.R.App.P.

First of all, it should be clearly understood that the district court considers regardless of the nature of the complaint, both in substance and form, regardless of its merits, the complaint warrants dismissal as a sanction against appellant for failure to notice the court of his new address and for not appearing at a hearing—regardless of whether appellant was notified of the hearing or not, regardless of proper venue and burden to appellant of appearing at a remote hearing site.

In the district court's opinion, whereas appellant failed to appear at a hearing on his complaint's compliance with Rule 8(a) prescribing short and plain claims, the complaint thereby by default fails to comply with that rule. We assert that a complaint may stand on its own, without a appellant appearing at a hearing to defend it. Whereas the issue before the court at the hearing was whether the complaint violates Rule 8(a), then appellant's appearance is unnecessary for a correct determination of that issue. His presence at the hearing is not irrelevant to due process or the issue of obeying court orders, but it is to correct determination of compliance with Rule8(a). Either the complaint complies or it does not.

Contrary to district court opinion, the court did not describe in detail to appellant, the specific contents required of a complaint. The issue is irrelevant though, since the court is not required to do so. The more important issue is that the district court erred in finding appellant did not provide sufficient specific detail in his initial 20 page complaint against the 17 appellees. Although a court must primarily consider the allegations contained in the complaint, matters of public record and items appearing in the record of the case may also be taken into account. 906 F.Supp. 256, Slater v. Marshall, (E.D.Pa. 1995) 105 Ed. Law Rep. 501. There was adequate detail for appellees to understand what was claimed and answer those claims if they had met their legal duty to be familiar with the prior record in the Florida judicial system, of

which the district court took official notice. Appellees as much as admitted the complaint fairly apprised them of the claims and grounds for relief by the very fact they asserted by motion to dismiss, that the prior record demonstrates conclusively that all claims made by appellant are barred by res judicata and collateral estoppel: "the claims set forth in this complaint, conclusively demonstrate the identity of the issues and their actual adjudication."

Appellant does not believe appellees and their attorneys were actually sufficiently familiar with the record to claim collateral estoppel and res judicata. Appellant believes they did so in contravention to legal ethical standards and the Fed.R.App.P. However, whereas they did assert "all claims * * * conclusively demonstrate" a bar, logically they have thereby conceded fair notice, and under the federal rules should have been compelled to answer. As the Second Circuit said in 49 F.3d 83 (2nd Cir. 1995) Simmons v. Abruzzo, 49 F.3d 83 (2nd Cir. 1995): "Indeed, it is evident that appellees understood the nature of Simmon's claims even from his original complaint * * * the dismissal with prejudice for failure to comply with Rule 8 was an abuse of discretion." In fact the district court in the instant case did order appellees to answer but later ignored its order, with objections from appellant.

Appellant was not surprised that his claims, many of which are taken nearly verbatim from the prior Florida judicial record, were unfamiliar to appellees. Appellees lied when they swore at a Florida public judicial proceeding they had read the entire record—which they were explicitly charged to do under Florida law; which happens to one of the claims appellant makes and will prove at trial.

The district court order for more specificity and detail was unwarranted.

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the appellee fair notice of what the appellant's claim is and the grounds upon which it rests. * * * liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed fats and issues. Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957).

This district court itself has held that while the pleading must be sufficient to give the defendant fair notice of what the claim is and the grounds upon which it rests, the pleader is not required to set forth in detail facts upon which the claim is based. Neizil v. Williams, 543 F.Supp. 899 (S.D.Fla.1982); 789 F.Supp. 392, City of Miami Firefighters' and Police Officers' Retirement Trust v. Invesco MIM, Inc., (S.D.Fla. 1992).

Nevertheless, pursuant to an inconsistent district court order, appellant went forward and prepared a far more specific 500 page amended complaint. Rather than risk underestimating the level of detail required and in so doing disobeying the court's order, appellant was much more detailed in the second attempt. The district court then found the amended complaint not short and plain enough. This *pro se* appellant was caught on the horns of a dilemma. He was allowed only two guesses at the perfect level of specificity which will suit the whim and fancy of the district court.

Nevertheless, the appellant stopped short of the district courts admonition to detail "the elements necessary to substantiate each claim." Listing each element required within each of 168 claims would have resulted in very much larger complaint. More importantly, this *pro se* appellant should not be burdened at the inception of this lawsuit (if ever), to list the elements necessary for proving each claim. That is inconsistent with the 'notice pleading' philosophy and was an abuse of the district court's discretion.

Also, the district court erroneously required appellant to file specific claims against specific defendants. The reason it's erroneous is because this complaint clearly alleges many of the appellees are individually liable for the acts of the board of trustees and officers as a whole. See 735 F.Supp. 375, Federal Deposit Ins. Corp. v. Paul, (D.Utah 1990). Therefore redundant claims against specific defendants are not necessary and serve only to unnecessarily lengthen and confuse the complaint. Nevertheless, appellant went forward and claimed redundantly against each individual defendant in the amended complaint, unnecessarily escalating the length of the complaint. The district court's own order for more specificity is the major reason why the 20 page very succinct initial complaint ballooned to 500 pages in an amended complaint.

Because federal courts simply require "notice pleading," the court must construe the pleadings liberally, and mere vagueness or lack of detail alone does not constitute sufficient grounds to dismiss a complaint. Strauss v. City of Chicago,

760 F.2d 765, 767 (7th Cir.1985). This district court clearly erred in so doing. Only sufficient detail must be given so that the defendants and the court can obtain a fair idea of what the appellant is complaining, and can see that there is some legal basis for recovery. Eli E. Albert, Inc. v. Dun & Bradstreet, D.C.N.Y.1950, 91 F.Supp. 283. The burden is on the defendants to demonstrate that the complaint is so vague or ambiguous that they cannot respond, even with a simple denial, in good faith or without prejudice to them. 846 F.Supp. 1372, Parsons v. Burns, (W.D.Ark. 1993). The defendants failed to meet their burden and the district court never required them do so.

A party fails to state a claim upon which relief may be granted only if that party can prove no set of facts upon which to grant legal relief. Ross v. Creighton Univ., 957 F.2d 410, 413 (7th Cir.1992); 812 F.Supp. 841, Lomas Mortg. U.S.A., Inc. v. W.E. O'Neil Const. Co., (N.D.Ill. 1993). Unless there is no doubt this has not been done, the complaint is sufficient. Even with a section 1983 claim, there is no requirement that the appellant detail the facts underlying his claims. Jordan by Jordan v. Jackson, C.A.4 (Va.) 1994, 15 F.3d 333. Such details may be obtained through use of discovery techniques authorized by rule 26 et seq. Elwonger v. Career Academy, Inc., D.C.Wis.1972, 54 F.R.D. 514. To state a claim on which relief may be granted it is not necessary to plead evidence or *the facts on which the claims are based*. Frito-Lay, Inc. v. WAPCO Constructors, Inc., D.C.La.1981, 520 F.Supp. 186. The district court erred in requiring "specific claims" and "the basis for the claims."

The district court opinion states:

> it is the opinion of this court that the amended complaint (all 500 pages of it) fails to comply with Rule 8(a) of the Federal Rules of Civil Procedure, and more particularly that portion of the rule which requires (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, and (2) a short and plain statement of the claim....

First with regards to an adequate jurisdictional statement; the issue is immaterial. The alleged facts of a complaint by themselves ultimately determine jurisdiction regardless of any jurisdictional statement or lack thereof. See Wright and A. Miller, Federal Practice and Procedure: Civil Sec. 1350, p. 548 (1969), and pp. 551-552. A federal court has a duty to

determine if it has jurisdiction. The district court pushed this *pro se* appellant on this issue in order to push him away from the bar. Pity to any poor *pro se* appellant who though able to state facts which merit relief in this district court, cannot make a satisfactory 'jurisdictional' statement. This appellant nevertheless, did specifically and succinctly make several qualifying jurisdictional statements, including *inter alia* 42 U.S.C. Sec. 1983, and 28 U.S.C. Sec. 1343, not to mention the 1st and 14th Amendments.

The district court states in its opinion that appellant failed "to explain why there is any merit to allowing the voluminous amended complaint to stand." The complaint's length was apparently weighed in the balance to measure its merit. What the district court is doing here by ignoring the substance of the complaint—its claims, is throwing a tub to a whale with the hope that it will go away. That its length was the chief issue regarding the amended complaint is clear from the way the district court repeatedly mocks appellant's "500 page" complaint in its opinion.

The district court clearly erred when it found the complaint violated Rule 8—without assessing any of the individual claims therein—judging the book by its cover so to speak. The "short and plain" provision of Rule 8(a) specifically addresses 'claims' not 'complaints.' "The Rule 8 requirement of conciseness is not to be judged by the length of the complaint." 52 F.R.D. 40, Karlinsky v. New York Racing Ass'n, (D.C.N.Y. 1971). As 2A Moore's Federal Practice, 2d ed., notes:

> The test of compliance with Rule 8 is whether the pleadings give 'fair notice of the claim asserted so as to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought, so that it may be assigned to the proper form of trial. Id., at 1695. See United States v. Employing Plasterers' Ass'n of Chicago, 347 U.S. 186, 189, 74 S.Ct. 452, 454, 98 L.Ed. 618 (1954) (Black, J.). The appropriate length and complexity of a complaint will vary with each case. Crumpacker v. Civiletti, 90 F.R.D. 326, 329 (N.D.Ind.1981).

And Wright and Miller:

> Rule 8(a)(2) speaks of a short and plain statement of each claim, not a short and plain pleading. Hence, in the context of a multiparty, multiclaim complaint each claim should be stated as succinctly and plainly as possible even though the entire pleading may prove to be long and complicated by virtue of the number of parties and claims. 5 Wright & Miller, Federal Practice and Procedure: Civil Sec. 1217 (1969).

Appellant has a due process right under Rule 18(a) to state as many claims as he has, and to have each claim reviewed on its own merits, such as to whether it comports with Rule 8. Appellant believes the district court has erroneously interpreted and broadened Rule 8(a) to address 'complaints.' Rule 8(a) specifically addresses 'claims,' and taken together with Rule 18(a) logically indicates the length of complaints is irrelevant. Appellant's individual claims cry out for recognition. The federal rules give them singular standing to be judged on their own merit and not in the context of the complaint.

A "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the appellant can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). [E]ven though there may be present in the Count material which might be stricken if subject to a motion to strike." 538 F.Supp. 572, Adler v. American Standard Corp., (D.C.Md. 1982). Did all of appellant's claims fail the "short and plain" test? So the district court would have us believe—"all 500 pages" of them. If one of them did not fail the test it should have been stricken. "[W]here the deficiency of the pleading is that it contains too much detail, the court should generally strike redundant or immaterial matter rather than dismiss the complaint." Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir.1988).

If there were specific claims which the district court deems to have violated Rule 8(a) then it should have stricken those specific claims. To summarily dismiss the entire complaint as meritless based solely on its length, without any evidence in the opinion the court examined even a single claim to see if it was "short and plain," was in clear contravention to Rule 8(a) and an abuse of discretion. No claims were stricken by the district court because no claims were read by district court.

The district court ostensibly went over the complaint with a fine tooth comb, "all 500 pages of it," and found thread and

thumb, not one single instance of a jurisdictional statement or claim which is short and plain enough to meet the requirements of Rule 8(a)—even under the federal rule's liberal notice pleading philosophy—and heightened liberality towards *pro se* non-lawyer plaintiffs. This part of the court's opinion should be taken with a grain of salt. "He who assumes duties may be required to perform them."—McKenna: Miller v. Strahl, 239 U.S. 426, 432. As John Locke said: "He that judges without informing himself to the utmost that he is capable, cannot acquit himself of judging amiss, Human Understanding. Bk. II. Ch. XXI.

If anyone violated the federal rules it was the district court. The rules charge the district court with weighing the claims not the complaint. It is not the province of a trial court to disregard rules made for its guidance. 2 F.R.D. 416, Walling v. West Virginia Pulp & Paper Co, (D.C.S.C. 1942). "If justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try."—Holmes: The Common Law, 48.

Rule 8(a) establishes two interrelated aspects of notice pleading: conciseness and understandability. Neither of these requirements should be overemphasized or applied to the exclusion of the other. In potentially complicated litigation like the instant case, plaintiff should go beyond the 'short' requirements of Rule 8 if that is necessary to set forth a 'plain' or understandable claim. See, e. g., Kirihara v. Bendix Corporation, 306 F.Supp. 72 4 (D.Haw.1969). Thus, in Highfield Water Co. v. Public Service Commission, D.C.Md.1980, 488 F.Supp. 1176, an 85 page gave defendants fair notice. Another 85 page complaint in Morgan v. Kobrin Securities, Inc., N.D.Ill.1986, 649 F.Supp. 1023, raising 13 separate claims against 15 separate defendants was deemed short and plain enough.

Long and involved complaints do not per se fail to pass the test of sufficiency under Rule 8, as clearly indicated by the Supreme Court's approval of the sufficiency of an antitrust complaint, although acknowledging that "[t]he Government's complaint may be too long and too detailed in view of the modern practice looking to simplicity and reasonable brevity in pleading." United States v. Employing Plasterers' Ass'n of Chicago, 347 U.S. 186, 189, 74 S.Ct. 452, 454, 98 L.Ed. 618 (1954) (Black, J.). Obviously, *pro se* non-lawyer appellants as this one are not trained and practiced in the art of federal pleading. Their complaints can often times be unnecessarily

long, as the court said in 771 F.Supp. 600, Citicorp Intern. Trading Co., Inc. v. Western Oil & Refining Co., Inc.: (S.D.N.Y. 1991):

> The Amended Counterclaims consist of two hundred and twenty paragraphs which allege thirteen causes of action. * * * While many of the allegations are repetitive and while the pleading is most assuredly not a model of clarity, length alone is not a sufficient grounds for dismissal under Rule 8(a). * * * However, given the Zanders' *pro se* status, the surviving counterclaims will not be dismissed on the basis of Rule 8(a) violations.

Even if a *pro se* complaint is vague and repetitive throughout. It must be construed liberally to determine if it gives the defendants fair notice of what plaintiff's claim is and the grounds upon which it rests. 537 F.Supp. 679, White v. C. I. R., (D.C.Colo. 1982); 10 F.R.D. 367, Forstmann Woolen Co. v. Murray Sices Corp., (D.C.N.Y. 1950); 538 F.Supp. 603, Frazier v. Collins, (D.C.Va. 1982).

Motions to strike alleged redundant, immaterial, impertinent or scandalous matter are not favored. Matter will not be stricken from a pleading unless it is clear that it can have no possible bearing upon the subject matter of the litigation. If there is any doubt as to whether under any contingency the matter may raise an issue, the motion should be denied. Even if the allegations are redundant or immaterial, they need not be stricken if their presence in the pleading cannot prejudice the adverse party. Moore, op. cit., p12.21, pp. 2317-8.

A motion to strike is the appropriate remedy for the elimination of redundant, immaterial, impertinent, or scandalous matter in a pleading. See generally, 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure Sec. 1380 (2d Ed.1990); 846 F.Supp. 1372, Parsons v. Burns, (W.D.Ark. 1993). 1948). The court, pursuant to Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 595-96, 30 L.Ed.2d 652 (1972), should scrutinize the pleadings of a non-lawyer appearing *pro se* with especial care to determine if among the dabblings, some colorable claim exists. Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976); Slotnick v. Garfinkle, 632 F.2d 163, 165 (1st Cir.1980); McDonald v. Hall, 610 F.2d 16, 17 (1st Cir.1979). No special scrutiny of this appellants claims is evident in the case at bar. On the contrary, it is evident this district court gave this *pro se*

appellant little due consideration—judging his book by its cover.

Appellant could have drafted his complaint with many of the claims combined into longer claims or less definitive claims. However, that would have been at the risk of such claims—as a whole, being held meritless while at the same time some merit exits within them which warrants relief. Or they might have been judged to lack definitiveness. Absent prejudice to appellees, appellant should be allowed to present his claims in any reasonable manner.

Of course appellant could resubmit his same claims by breaking up the complaint into several bite sized separate civil actions, small enough for the district court to chew on. If the district court prefers several small complaints to one large one, so be it. However, that would be inconsistent with the philosophy of the federal rules which foster settling all disputes between parties in one civil action.

Obviously the claims could have been presented in many different ways. Some Circuits apparently require complaints seeking relief under more than a single statute to set out the different claims separately. Distributing Company v. Glenmore Distilleries, 267 F.2d 343, 345[3] (6th Cir.1959). However, "The objective of Rule 8, supra, was to make complaints simpler, rather than more expansive." Harrell v. Directors of Bur. of Narcotics, Etc., supra, 70 F.R.D. at 445[2], citing Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 103[10], 2 L.Ed.2d 80 (1957). Appellant endeavored, in accordance with Rule 10(b) Fed.R.App.P., to limit each claim to a separate and distinct circumstance, transaction, or occurrence, i.e. factual matter, rather than separate legal grounds for relief. He was however, subjected to constraints imposed on him which no *pro se* non-lawyer should be burdened by in a so-called fact based 'notice pleading', to provide numerous separate redundant claims arising out of the same transaction involving each defendant, and separate redundant claims against them in their official and individual capacities, and so forth. If appellant was simply allowed to describe the factual circumstances and how specific individuals were involved, and what laws he thought they violated, the complaint would have been less than 20 pages long.

The district court also dismissed the case as a "sanction" for "repeated failure of the appellant to justify the complaint." Appellant necessarily must guess what the court means by this statement. The district court appears to be alluding to: (1) ap-

pellant's failure to appear at a hearing where he was allegedly ordered to appear and 'justify' his complaint; and or (2) appellant's failure to 'justify' the length of the complaint, which the district court carps is not short and plain; and or (3) appellant failed to 'justify' the merits of his claims. Appearance at the hearings and the length of the complaint were discussed *supra.*

At this juncture appellant addresses the issue of his alleged failure to establish the 'merit' of his complaint. Whereas the federal rules require appellant to prove the merit of his 'claims,' not the merit of his 'complaint,' the district court erroneously required appellant to justify his complaint. Nowhere in this district court's opinion does the district court indicate there is a lack of merit to any of the appellant's individual claims. Not even a single claim made by the appellant has been addressed by the court (or appellees) in this case to date. The district court provides not the least bit of discussion why any specific claim lacks merit. Whether or not appellant has justified his 'complaint' is irrelevant. Each 'claim' is what the appellant must in due course 'justify.' The district court has put the cart before the horse. Appellant should have had his claims answered, and then given an opportunity to effect discovery.

The appellees argued in their Motion to Dismiss: "The Complaint fails to state a claim for which relief may be granted under 42 U.S.C. Section 1983" and "The Complaint violates Rule 12(b)(6) of the Federal Rules of Civil Procedure by failing to state a claim for which relief can be granted." The district court responded in the magistrate's initial recommendation to dismiss: "There appears to be at least some substantive merit to defendants' Motion to Dismiss."

The district court later stated in its final opinion dismissing the complaint, that appellant failed to show "why there is any merit" to his complaint, and repeatedly failed "to justify the complaint." This opinion is inconsistent with its dismissal "without" prejudice, which renders no opinion regarding the merits. If there is no apparent merit to each and every claim, assuming all proffered facts true, then the dismissal should have been "with" prejudice—which this dismissal is in reality, due to likely limitations of statutes. This district court hides an iron hand in a velvet glove.

When appellant submitted his amended complaint, the district court's first step was to immediately burden appellant with justifying his complaint at a hearing. What the district court should have done was place a burden on the appellees to

justify any opposition they may have to appellant's claims. The district court in compelling appellant to 'justify' his claims prior to appellees' answer, has not only put the cart before the horse, it has failed set the saddle (burden) on the right horse.

As soon as the amended complaint was filed, the district court vacillated on its order that appellees answer the complaint specifically, attacking each individual claim, and *sua sponte* called appellant to a hearing where he was burdened with justifying his 'complaint,' though not even one challenge had been specified against any individual claim. Appellant was taken in the toils of defending each of his claims against undefined objections.

The decision to dismiss for failure to prosecute, as in this case, is usually considered a harsh remedy. 103 F.R.D. 614, Silver v. Mohasco Corp., (D.C.N.Y. 1984). And when with actual prejudice, as also in this case, it is an extremely harsh action by a district court. Dismissal with prejudice is an extreme sanction which is appropriate only in cases of willful misconduct. Ehrenhaus, 965 F.2d at 920. Moreover, when the litigant appears *pro se* the court must more carefully assess whether other less extreme sanctions would be appropriate. Id. at 920 n. 3. 160 F.R.D. 599, Mobley v. McCormick, (D.Colo. 1995).

The record shows no evidence showing "significant periods of total inactivity," or evidence of aggravating factors. Berry v Cigna/RSI-Cigna (1992, CA5 Tex) 975 F2d 1188, 60 BNA FEP Cas 265, 60 CCH EPD P 41837, 24 FR Serv 3d 299. Failure to appear at the hearings by itself is not sufficient cause to dismiss, since the record did not reflect willful egregious conduct and clear record of delay. See Meeker v Rizley (1963, CA10 Okla) 324 F2d 269; Krank v Express Funding Corp. (1990, SD NY) 133 FRD 14.

Nor did appellant's failure to appear at two hearings so severely prejudice appellees that it would be unfair to make them proceed. Appellee's attorneys do their business in Miami where the hearings were called. On the contrary, appellant is the one who is prejudiced with traveling 150 miles to those hearings.

The district court also appears to have dismissed the complaint as a sanction against appellant for using venomous rhetoric and vitriolic dialogue. The district court opinion found there to be "vitriolic dialogue contained in plaintiff's response (and virtually every other paper he has filed)." Earlier

in the record the district court described what it deems is "venomous rhetoric that permeates the motion" and "borderline contemptuous verbiage."

In reality, appellant's papers are not so black as painted by the district court. As this appellate court reviews the record below, keep an eye out for vitriolic (very caustic, bitter, scathing) dialogue which supposedly exists in *virtually every paper* filed by the appellant. It won't take long to realize that opinion is clearly erroneous.

The district court is making a mountain out of a molehill. Appellant criticized the judicial system, but in a manner well within his right to do so, and in a manner that in no way whatsoever impeded the court in performing its judicial functions. That this criticism struck a nerve and prompted such a hostile and defensive reaction by the court is indicative of a court which has good reason to feel insecure about its integrity.

"The need is great that courts be criticized."—Justice Frankfurter: Bridges v. California, 314 U.S. 252, 284. Appellant is not afraid to take the bit between his teeth and sail against the wind. "Discipline is not common in democracies, and it is particularly difficult to introduce it where the ranks of the privates are largely composed of thinkers."—Brandeis, by Mason, page 312. And as Justice Black said:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however, limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.—Bridges v. California, 314 U.S. 252, 270-71.

What this district court apparently objects to is any criticism of itself whatsoever. Appellant is not an officer of the court and will not supplicate and bow knee to Rimmon as attorneys practicing before it may routinely do. "The liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge."—Frankfurter: Dennis v. United States, 341, U.S. 494, 550.

Appellant will criticize anyone and any system he wishes, but he does so in a thoughtful and reasonable manner. To the

overly sensitive and insecure, such criticism is no doubt viewed as this district court characterized: "borderline contemptuous." If appellant's criticism offends, so be it. "Criticism of government finds sanctuary in several portions of the First Amendment. It is part of the right of free speech."—Black: Wilkinson v. United States, 365 U.S. 399, 425-26.

Appellant feels his criticism has been supremely restrained, as Montaigne, the 16th century French essayist and guru of our founding fathers said: "I tell the truth, not as much as I would, but as much as I dare—and I dare more and more as I grow older."

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however, limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.—Black: Bridges v. California, 314 U.S. 252, 270-71.

And as U of S. Cal law professor Erwin Chemerinsky recently said "The president or anybody has the right to criticize judges, even in harsh terms. The judge has life tenure. He can ignore it." In the instant case however, rather than ignore it, this district court sanctioned appellant by dismissing his case for expression of his critical opinion.

Relief Sought

In closing, appellant seeks reversal of the dismissal and remand for further proceedings, *inter alia*, venue transferred to Key West, an answer from defendants, a chance to begin discovery, and so forth, consistent with appellant's positions and opinions as described *supra*.

Mel Jenkins, *Pro se*, appellant.
PO Box 2525
Key West, FL 33045

No. _____
October Term, 1997

In the
Supreme Court
of the
United States of America

Mel Jenkins, Petitioner

v.

Florida Keys Community College, et al., Respondents

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

Petition for Writ of Certiorari

Appendix
C

Mel Jenkins, *Pro Se*
PO Box 2525
Key West, FL 33045

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Appellant Reply Brief

Mel Jenkins - Appellant
vs.
Florida Keys Community College, et al. - Appellees.

Appellate Docket No.: 96-4456

Appealed from

U.S. District Court
Southern District of Florida

District Court No.: 95-10003-CIV-SH

Appellant: *Mel Jenkins*, appearing *pro se*.

Appellee Counsel:

Peter L. Sampo, Esq., Hogg, Allen, Norton & Blue, *P.A.*, attorney for defendants Robert Norton, Jeffrey Goodz, and Rodolfo Gomez.

Marlene S. Reiss, Esq., Stephens, Lynn, Klein & McNicholas, *P.A.*, attorney for the remaining defendants.

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INTRODUCTION

This appellant principal brief is a reply to the appellee principle brief (referenced herein as "college brief") submitted by attorneys currently representing Florida Keys Community College and its officers individually named in this suit. Those defendants are referenced herein as the "college-defendants." Appellant is referenced herein as appellant, plaintiff, teacher, and various combinations thereof.

Appellant also replies here to the principal appellee brief (referenced herein as "attorney brief") submitted by attorneys representing defendants Norton, Gomez, Goodz, and DeVane. These 4 defendants are attorneys who represented the college-defendants during proceedings at which this appellant-plaintiff-teacher was terminated from his tenured teaching position at the defendant community college. These defendants are referenced herein as "attorney-defendants."

Upon review of the principal appellee briefs, this appellant-plaintiff was initially pleased to see that attorney-defendants do not contest plaintiff's "recitation of the proceedings and disposition of this case by the District Court." In other words plaintiff's statement of the case and facts is suitable to them [attorney brief, pg. 3]. Unfortunately the college-defendants' statement of the case and facts diverges far afield from its designated purpose. College-defendants' statement is permeated throughout with argument. It does little to introduce the appellate court to existing undisputed case history and facts.

The principal briefs on both sides reveal that appellant and appellees have joined issue in several key areas, such as whether plaintiff's 500 page complaint violates the federal pleading rules, and whether plaintiff willfully violated district court orders to appear at two hearings. However, plaintiff

does not join the college-defendants in their view that a *res judicata* bar is an issue for this appellate court to consider. *Res judicata* is the predominant issue raised by college-defendants. They devote 8 of their argument's 10 pages to asserting a *res judicata* bar against **all** of plaintiff's claims. Whereas the district court issued no opinion or ruling on a *res judicata* bar in the instant case, plaintiff believes it would be improper for the appellate court to consider that issue prior to the district court having an opportunity to do so. Nevertheless, unsure of this appellate court's opinion on the matter, appellant-plaintiff is compelled to at least briefly argue what plaintiff considers an irrelevant issue.

In addition to those issues joined, several issues raised by plaintiff in his principal brief were simply ignored by the defendants in their principal briefs. Defendants failed to address the following issues—for whatever reasons they might have:

- did plaintiff lie to the district court about not receiving notice of the hearing?
- did plaintiff fail to properly notify the court of his address change?
- did plaintiff lie to the district court about his address?
- did the court dismiss plaintiff's complaint in material part because he does not have a fixed permanent street address, i.e. is homeless, and uses a post office box instead?
- was the November 16th "Notice of Hearing" from the court, an order compelling appearance of plaintiff, or merely a notice giving plaintiff an opportunity to be heard?
- was plaintiff's appearance at the two hearings necessary to carry forward the action, i.e. prosecute the case at the notice pleading stage?
- did the district court have reasonable alternatives to plaintiff's personal appearance at hearings in Miami, such as telephone and video conferencing?
- is plaintiff unfairly denied reasonable access to the record of these proceedings in the district and appellate court, because that record is located in Miami, with no copy available at the Key West federal court house where proximately all litigants reside and the complaint was filed?

- was venue properly laid in Miami rather than Key West?
- was the chosen venue a matter of the district judge's discretion, as stated by the magistrate, or does Federal Rule 77(b) Fed.R.App.P. and local district court Rule 3.1.D. prescribe hearings in Key West rather than Miami, unless appellant agrees to hearings elsewhere?
- does the imposed venue have the appearance of impropriety?

Whereas defendants failed to address those issues, plaintiff for the most part does not address them in this reply. Appellant-plaintiff hereafter replies to defenses taken by the appellee-defendants in their principal briefs.

ISSUES RE THE HEARINGS AND VENUE

The college-defendants state in their principal appellee brief that "The Plaintiff's failure to appear at two court ordered hearings on the issue of the propriety of his complaint is in and of itself sufficient reason to dismiss the Plaintiff's Amended Complaint." [college brief, pg. 17]. Plaintiff disagrees. Taken literally this would mean that if a plaintiff is hospitalized in a coma, kidnapped, perhaps mentally ill, or a host of other possibilities, none of this matters; missing two hearings is sufficient to dismiss a complaint, presumably with prejudice, precluding reassertion of any rights and remedies deprived. Failure to appear at 2 hearings is not by itself—regardless of circumstances, sufficient reason to dismiss.

Willful refusal to appear at hearings is another matter. Defendants and the district court opine that plaintiff willfully refused to attend 2 hearings: "dissatisfaction * * * simply chose to not show" [college brief, pg. 4, 17; Dkt. II-57, pg. 5-6]. That is bunkum. Plaintiff was not notified of the first hearing, nor notified of the second hearing in sufficient time to attend, after his motion to change its venue was denied.

Attorney-defendants also address this issue in their principal brief, and likewise, sail pretty close to the wind. They use the term "disagreement" to describe plaintiff's reason for not attending the hearings [attorney brief, pg. 13-14]. Yes, plaintiff was truly dissatisfied and disagreed with the order denying a change of venue, but the order wasn't served to plaintiff until it was too late for him to be notified it would go forth.

Plaintiff received that notice 5 days after the hearing had already occurred. Defendants have got the cart before the horse.

The college-defendants argue plaintiff filed a *vitriolic* motion to change venue, wherein he allegedly made such statements as: "the Key West court house is merely a front for a judicial vacation retreat * * * since the defendants' lawyers are from Miami, they probably surreptitiously had something to do with the case being assigned to Miami judges." [college brief, pg. 10]. College-defendants unfairly quote here out of context. Those are not Plaintiff's own words. Plaintiff was quoting people whose opinion he solicited about the change of venue, in order to evidence an appearance of impropriety. More importantly, plaintiff is later correctly quoted by these defendants on page 10 acknowledging he "does not actually know why one of the Key West Federal judges was not assigned to handle this case, but it seems clear to plaintiff that even to the common man on the street, it has the appearance of impropriety."

College-defendants state in their principal brief the district court "DISMISSED THE PLAINTIFF'S AMENDED COMPLAINT FOR HIS REPEATED CONTUMACIOUS DISREGARD OF THE DISTRICT COURT'S ORDERS." [college brief, pg. 3; also pg. 17]. Defendants are a bit wide of the mark here. The court did not use the term "contumacious" in any of its orders or other documents issued in the instant case. There is a significant distinction between *contumacious* disobeyance of an order and simple disobeyance of an order through negligence or incapacity. Namely, 'contumacious' denotes: stubbornly perverse or rebellious; willfully disobedient. Though the court did not say plaintiff was "contumacious," the court did infer his non-attendance was *willful* by its opinion that plaintiff's complaint is "dismissed for lack of * * * any effort to comply." [Dkt. II-57, pg. 7]. Plaintiff disputes this alleged willful disobedience in his principal brief at pages 8, 10, 26, and 51-52.[14]

College-defendants also leave the impression that plaintiff offered no reason for his lack of appearance at the hearings [college brief, pg. 11]. Not true. Plaintiff was ordered by the district court to and did timely file a paper showing cause for

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14 "Willful as used in the context of a failure to comply with a court order ... implies a conscious or intentional failure to act, as distinguished from accidental or involuntary noncompliance." *Welsh v. Automatic Poultry Feeder Co.*, 439 F.2d 95, 97 (8th Cir.1971)).

his not attending the initial hearing [Dkt. II-59]. The reasons for not attending the hearings are also described in plaintiff's principal appellate brief [pg. 13-15, 25-26], which were *inter alia*: (a) excessive burden on this *in forma pauperis* plaintiff to travel and secure lodging in Miami 150 miles away from his location in Key West; (b) there was no court order to appear; (c) attendance at the hearing was not necessary to assess whether the claims provide fair notice and can be answered; (d) local federal rule requires those hearings be held in Key West.

Similarly, attorney-defendants argue plaintiff did not timely show cause for his non-attendance at the hearing: "filing of untimely responses after threatened dismissal was delay and willful violation which warranted dismissal" [attorney brief, pg. 11]. The district court agrees, stating in its opinion that plaintiff failed to timely show cause for not attending the hearing [Dkt. II-57, pg. 6]. In so doing, the district court abused its discretion by ignoring a conspicuous and material fact within its own hands, i.e. a document on file with the court which shows irrefutably that plaintiff served a timely response to the order to show cause. Both the district court and defendants' attorneys have suppressed the fact that plaintiff served an immediate and timely response to that order to show cause. If this appellate court orders them to cough up the envelopes they're covering up, within which that response was mailed by plaintiff, and post marked, it will shamefully expose the district court's abuse of discretion and the attorneys' unethical withholding of material facts.

The college-defendants also attempt to mislead this appellate court into believing plaintiff "never notified the district court of his change of address" [college brief, page 10-11], and that plaintiff "alleged" a change of address [college brief, pg. 13]. On this point these defendants echo the same misleading finding of the district court [Dkt. II-57, pgs. 1, 5]. Once again, they are both sailing under false colors. The record irrefutably shows plaintiff notified the court of his change of address [Dkt. II-59]. The milk in the coconut is not whether he informed the district court of his change of address, clearly he did, it is whether he failed to notify the court in a proper and timely manner, and if not, whether such failure warrants this dismissal—effectively with prejudice. Plaintiff violated no federal rule or district court order pertaining to his address. The court and defendants always had a valid and effective mailing address for plaintiff.

The college-defendants would have the appellate court believe: "Defense counsel and the trial judge incurred the expense and waste of time by attending the hearing and waiting for the Plaintiff to show up." [college brief, pg. 17]. Likewise attorney-defendants moan "wasting the valuable time of both the court and opposing counsel" [attorney brief, pg. 20]. Nonsense. They waited 30 minutes. Surely, the expense and burden on this *in forma pauperis* plaintiff to spend 6 to 8 hours traveling to Miami, and lodging in a hotel (as defense counsel have recommended), is a far greater burden than what these wealthy attorneys and magistrate incurred. The implication is that the time and abundant wealth of these attorneys, i.e. their multimillion dollar client college, was far more prejudiced than this plaintiff who can barely keep his head above water. What rubbish. Plaintiff would relish an opportunity to try that issue before a jury of common citizens. If the district court had properly laid the proceeding in a venue of *unquestionable propriety*, namely, Key West, this wouldn't be an issue. They strain at a gnat as they swallow a camel—crying about their insignificant inconvenience as they deny plaintiff due process.

The attorney-defendants go on to argue "The District Court's failure to rule on Jenkins' motion for change of venue did not relieve him of the responsibility to attend the rescheduled hearing on February 8, 1996." [attorney brief, pg. 14]. They cite *Hepperle v. Johnston*, 590 F.2d 609, 613 (5th Cir. 1979). Examination of *Hepperle* reveals there is no applicable authority in the case. The appellant in *Hepperle* failed to appear at 4 depositions—not 2 hearings, and it was not for lack of financial means, it was due to his minor inconvenience. Furthermore, the appellant in *Hepperle* was not being denied a due process right by the venue that of deposition, as in the instant case, wherein plaintiff is due hearings in Key West by way of an explicit federal procedural right afforded him—namely Local Rule 3.1.D.

The district court judge Shelby Highsmith and magistrate Stephen Brown had a personal interest in where the hearings would be held. They didn't want to travel all the way to Key West. So they ignored the rule of law for their own convenience—law which was specifically created to insure that the convenience of litigants in Monroe County would outweigh the convenience of those Miami judges. In so doing, Highsmith and Brown acted in an arbitrary and capricious manner, abusing their discretion.

That venue rule notifies litigants where proceedings will be held. How can citizens be expected to act in accordance with federal rules which do not predict what the court will in fact do? Written law should prophesize "what the courts will do in fact" as O.W. Holmes, Jr. discussed in his seminal essay "The Path of the Law" (Harvard Law Review, Vol. 10, 1896, 457-478). How can citizens have respect for federal courts which arbitrarily ignore rules established for their own guidance?

ISSUES RE THE COMPLAINT

The district court and defendants rejected plaintiff's complaint extrinsically for being too long, and intrinsically for failing to give fair notice. The college-defendants additionally assert a *res judicata* bar to all of plaintiff's claims.

The sufficiency of a complaint is a question of law. In reviewing a complaint, all well-pleaded facts, as distinguished from conclusory allegations, must be taken as true. *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984). With that in mind, plaintiff herein pleads for a *de novo* review of whether his complaint complies with the federal notice pleading rules.

The attorney-defendants argue that plaintiff violated the "short and plain statement" requirement of Rule 8(a) in both plaintiff's initial and amended complaints. Attorney-defendants state plaintiff was: "given a full opportunity to file a complaint which complied with Rule 8(a), thereby curing the defects in his original complaint." [attorney brief, pg. 18]. They're a bit off the beam. The district court rendered no such opinion in dismissing the *initial* complaint. Rule 8 is not mentioned in the magistrate's report and recommendation that was adopted by the district court dismissing the initial complaint.

The college-defendants state in their principal brief that plaintiff filed a "500 page complaint * * * clearly in violation of the district court's October 16, 1995 order," and "an egregious and flagrant violation of the district court's order" [college brief, pgs. 3, 15, 16]. College-defendants didn't quite hit the nail on the head either. There was no order from the district court regarding the *length* of the *initial* complaint. As the college-defendants themselves described in their principal brief at page 16, what the court actually ordered was:

> "specific claims against specific Defendants." The district court further ordered that "[a]s to each claim, the Plaintiff shall cite the basis for the claim, the basis for

the court's jurisdiction, the specific facts giving rise to the claim, and the elements necessary to substantiate the claim."

Attorney-defendants echo college-defendants in the illusion that the district court ordered plaintiff not to file *another* long complaint:

> after the dismissal of his original complaint, Jenkins was well aware that a complaint excessive in length * * * was subject to dismissal by the court. [attorney brief, pg. 18].

Plaintiff was not "well aware" his 500 page complaint would be dismissed as excessive in length. This *pro se* plaintiff has never seen a complaint before, and there was no mention of length as a concern in the district court's order to amend the complaint. On the contrary, the court seemed to be ordering *more* length. The district court order to amend emphasized the need for more specific facts, specific jurisdictional statements, and specific formal legal elements necessary to substantiate each claim. Plaintiff was ordered to claim specifically against each of the 17 defendants in separate counts, rather than as he initially did, against groups such as "members of the board of trustees." Some other district courts have wisely accepted such group claims in furtherance of the federal pleading rules which require claims to be: "short and plain * * * simple, concise, and direct. No technical forms of pleading or motions are required." The federal pleading rules "eschew the sterile formalism which permeated the approach to this case in the District Court." *Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984).* The district court's own order is the cause for plaintiff's numerous redundant and excessively detailed claims, needlessly extending the length of the complaint.

> Rule 8(a)(2) requires only that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." [footnote †] This liberality in pleading was one of the major reforms achieved by the 1938 Federal Rules. The attempt to set out each party's view of the facts was shifted from the pleading stage to the discovery stage, so that parties were not forced to take positions on the facts before they had access to witnesses and documents, some of

which might be within the control of the opposing party.

†The only exceptions are those set out in Rule 9, * * * [averments of fraud or mistake]. Arguments that certain types of cases, such as civil rights actions, should be treated differently have been rejected by the Supreme Court. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993).

[*The December 1993 Amendments To The Federal Rules Of Civil Procedure - A Critical Analysis*, Leslie M. Kelleher (Assistant Professor, University of Richmond, School of Law)].

The district court abused its discretion when it ordered this *pro se* plaintiff to submit a 'notice pleading' with detailed facts, detailed jurisdictional statements, and the elements necessary to substantiate each and every claim.

[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8 (f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. Maty v. Grasselli Chemical Co., 303 U.S. 197. [*CONLEY v. GIBSON*, 355 U.S. 41 (1957)].

Defendants repeatedly emphasize the '500' page length to mislead the courts into believing they must plow through 500 pages of substantively different claims. In actuality, because of the pervasive redundancy among the claims, the substance of the claims encompasses only a small fraction of the 500 pages.

Incredulously, the college-defendants purport that plaintiff violated the district court's order to elaborate his claims in that amended complaint—*even though it is 500 pages long*: "[F]ailure to file an amended complaint that satisfied the foregoing requirements * * * Instead, the Plaintiff filed a 500-page complaint." [college brief, pg. 13]. This should be taken with a grain of salt. It is hard to imagine how the 500 page complaint fails to provide sufficient specificity for a 'notice pleading.' Contrary to defendants' half-baked allegation, the order dismissing the amended complaint gives no indication whatsoever, that the 500 page complaint lacked the specificity ordered by the district court. There seems to be no rhyme or reason for defendant's inconsistent and factually erroneous allegation other than perhaps a blind boilerplating of legal defenses to enhance billing charges to their clients.

Defendants also argue that plaintiff's "500-page Amended complaint * * * was clearly in violation of" and "[b]y its very length * * * an egregious violation of Rule 8(a)." [college brief, pg. 16, attorney brief, pg. 15]. Not so. It would be a 'clear' violation if the rule said something like "no complaint shall exceed 400 pages in length." The rule says nothing like that. A 500 page complaint is not a 'clear' violation of Rule 8. The framers of Rule 8 did not inadvertently forget to put a page limit on the length of complaints when they set page limits on other court documents. Nor did they inadvertently codify that "claims" must be short and plain, rather than "complaints" must be short and plain. The framers did not inadvertently provide that a plaintiff may present as "as many separate claims" as he has. A complaint can not be dismissed "by its very length" alone, as defendants assert and district court acted.

The college-defendants argue "The courts are replete with complaints dismissed for failure to comply with Rule 8(a) of far less length and detail than Jenkins amended complaint."[15]

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[15] Here again they inconsistently allege too much detail, yet in the same brief assert the amended complaint lacked sufficient specificity.

They cite several complaints dismissed with lengths of 125, 69, 43, and even 15 pages [college brief, pg. 25]. Their tunnel vision search for cases which were dismissed in part based on "length," is of little probative value. Many very long and excessively detailed complaints have also been upheld, Cf. two 85 page complaints in *Highfield Water Co. v. Public Service Commission*, D.C.Md.1980, 488 F.Supp. 1176: and *Morgan v. Kobrin Securities, Inc.*, N.D.Ill.1986, 649 F.Supp. 1023. What defendants missed with their cursory examination of the cases they cite, is that prolix by itself was not the cause for dismissal. The reasons discussed in those cases include 'prolix' combined with other attribute(s) such as: excessively redundant, conclusory, confusing, unintelligible, immaterial, impertinent and scandalous.

On the other hand, the attorney-defendants proffer a valid reason, other than length, for dismissal of a complaint. They argue that plaintiff's complaint was "excessive and unnecessarily complex * * * unintelligible," "rambling," "irrational, prolix and redundant * * * impossible to follow and put no one on notice as to what his claims were," "impossible to extract anything substantive * * * much less an idea of his claim and the grounds upon which it rested," "incoherent," and "confusing and conclusory." [attorney brief, pgs. 19-26].

Of course proof of the pudding is in the eating. Plaintiff's believes his claims adequately speak for themselves. Plaintiff beseeches this appellate court do what the district failed to do—examine those claims. Don't render a horseback opinion like the district court did. *De novo* assess whether these claims can fairly be characterized as *unintelligible and utterly failing to put defendants on fair notice as to their nature*. Do YOU believe that the plaintiff who writes these very words YOU are reading, would submit a complaint which is "incoherent" and "impossible to follow"? Or is it more reasonable to believe these are merely boilerplate defenses presented with little consideration as to their merit (incidentally, in violation of Rule 11, Fed.R.Civ.P. proscriptions against disingenuous pleadings). If the complaint is so unintelligible, how can defendants in good faith justify a *res judicata* defense against each and every claim?

Defendant and district court statements that plaintiff's claims are "unintelligible," "irrational" and "conclusory" are themselves conclusory. They bring forth *not a single sample claim, not a scintilla of phrasing from the complaint, by which to factually support their conclusions*. There is no principled

factual basis presented for these conclusions on the part of the defendants and district court.

You can't judge a book by its length—nor a complaint. Yet that is just what the district court did. Instead of scrutinizing the pleadings of this non-lawyer with especial care to determine if some colorable claim exists, e.g. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976); *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 595-96, 30 L.Ed.2d 652 (1972), or closely examine his complaint for a "hint of suggestion," 108 F.R.D. 152, 155, *Robinson v. Griffith*, (D.C.La. 1985), that he has made allegations which if proven at trial would constitute a complete defense, this district court failed to make any effort to read even a single claim made by plaintiff. Instead of weighing the merits of plaintiff's claims on the scales of justice, the district court apparently weighed the complaint on the office postal scale.

Plaintiff believes he received no due consideration chiefly due to his *pro se* status. If he were a large corporation such as AT&T or IBM, plaintiff believes the district court would have shown some evidence it examined at least *one* claim, before it categorically threw them all out as insufficiently short and plain. The U.S. Constitution confers no preferential right to plead in U.S. Courts to corporations or litigants represented by attorneys. Plaintiff further believes that although there is much federal law declaiming a liberal treatment of *pro se* (layman) litigants, in reality, *pro se* litigants are generally given short shrift and viewed by officers of the court as a nuisance with little if any merit to their claims.

It may be said to be generally true that the weaker a party and the smaller his interest the greater the need of the strong hand of the court to ascertain and protect his rights.—Brewer: [*Montana Co. v. St. Louis M. & M. Co.*, 152 U.S. 160, 170].

The attorney-defendants admit "it is generally an abuse of discretion to deny leave to amend when dismissing a complaint on the sole ground that it does not constitute a short and plain statement as required by Rule 8." [attorney brief, pg. 20]. However they assert that plaintiff had "been given ample" and "full and fair opportunity to cure the defects in his complaint." [attorney brief, pg. 23]. Furthermore, "The rules of pleading are not overly complex or difficult. In fact, it has been said that a sixteen year old could plead under these rules." [attorney brief, pg. 24]. The college-defendants add that the district court "Graciously" gave plaintiff "an opportunity to

amend his initial complaint with specific instructions from the district court [college brief, pg. 13].

Defendants are trying to throw dust in your eyes. The district court, adhering to clear precedent and quoting it profusely, begrudgingly gave this *pro se* plaintiff a second chance to compose a perfect complaint. Plaintiff was given only two chances to precisely guess what level of detail and specificity would suit the whim and fancy of the district court. The first complaint apparently had too little detail to please the court; the second too much. If there was too much detail, the court should have ignored or struck it out. The federal rules were not adopted to set traps and pitfalls by way of technicalities for unwary litigants. Fair notice is the touchstone, and that has been tacitly admitted by defendants' adamant assertion of *res judicata* on all claims made by plaintiff.

As noted *supra*, attorney-defendants' said it is plaintiff's own fault for his inability to follow the federal rules, because even 16 year olds could understand and follow them. That simply does not hold water. If the federal rules were so easy that 16 year olds could readily comprehend and unfailingly follow them, there would be no need to teach federal procedure in law schools. Heck, just make it a high school requirement! If the federal rules were really so easy to assimilate, there would never be licensed attorneys found in violation of those rules due to their apparent inability to fully understand them. Verily, it seems the district court itself has failed to fully comprehended the rules, since it failed to discern that the rules ask for short and plain *claims*, not *complaints*, and that when the rules say proceedings '*shall*' be conducted in Key West, they don't mean "if it is not inconvenient for the magistrate." If the rules were so easy to follow there would never be need for an appellate court to overturn a district court's incorrect application of the rules. If the rules were so manifestly clear and easy to comprehend then these very 'attorney'-defendants would not have failed to understand the federal rules themselves, to wit:

Attorney-defendants state that dismissal of plaintiff's complaint under Rule 41(b) operated as an adjudication on the merits of his complaint because the district court "did not indicate that the dismissal was not an adjudication on the merits." [attorney brief, pg. 9]. Yet the district court's final order specifically dismisses "without prejudice." The court indicated by that qualifier that dismissal was not an adjudication upon the merits. These 'attorneys' failed to grasp this funda-

mental aspect of the federal rules. Before mocking this layman's knowledge of the federal rules, these attorney-defendants should set there own house in order.

Nonetheless, they are right for the wrong reasons. Plaintiff maintains that due to applicable statutes of limitations, by default and in effect, the dismissal is *with prejudice* and therefore an adjudication on the merits of many if not all of his claims, precluding any further consideration of the actual merits in district court. That is a pretty severe sanction for the alleged wrongdoing this *pro se* plaintiff is charged with.

As discussed *supra*, college-defendants predominately defend in their principal brief by asserting a *res judicata* bar of all plaintiff's claims. Inconsistently however, they have no "idea of his claim" because his complaint is "impossible to follow and put no one on notice as to what his claims were." They adamantly assert that *every single issue* plaintiff raises in his complaint or *could have raised* in any amended complaint, has been fully adjudicated, and thus barred by *res judicata* [college brief, pgs., 5, 14, 18, et al.]. Plaintiff wonders how they could know each and every claim is barred while at the same time it is "impossible to extract anything substantive * * * much less an idea of his claim" from the complaint?

This is not simply a matter of defendants presenting inconsistent alternate theories of defense, which might be allowable. The central issue is whether the claims are clear enough to allow defendants to answer. They have tacitly admitted fair notice by unwittingly demonstrating they can answer 'all' of the claims. So let them answer. What are they afraid of? If their *res* defense is so solid, they should answer and let the district court consider the issue, not ask the appellate court to take up the issue for the first time.

Whereas nearly their entire appellee argument is devoted to the position that *all* claims are barred, these college-defendants have squarely placed themselves in admittance of fair notice as to the nature of plaintiff's claims and thus able to prepare a responsive answer. Defendants presented this same *res judicata* argument in the district court. Although the district court never opined on the issue, the district court abused its discretion when it refused to acknowledge—despite plaintiff's repeated objections, the conspicuous truth defendants revealed by that argument—that they had fair notice of plaintiff's claims.

"It takes two to speak the truth—one to speak, and another to hear." [Henry David Thoreau (1817-1862)].

Defendants should have been ordered to serve an answer to those claims which it can answer, and allowed to move for a more definite statement or other action as to remaining claims. If a *res judicata* bar applies to any or all of plaintiff's claims, that is something each party should have full and fair opportunity to argue before the district court. Being unsure whether this appellate court agrees with that, plaintiff is regrettably compelled to at least summarize herein, his *res judicata* retort. See *Motion for Dismissal, Response* [Dkt. I-31, I-32, I-33] for a more elaborate presentation of plaintiff's position on the issue.

First of all, defendants present the illusion plaintiff's claims are in their entirety a wrongful termination claim [college brief, pgs. 5, 14, 19, 23]. Not so. Plaintiff claims *inter alia*, the college-defendants unlawfully withheld his paychecks, denied him access to public records (the college's policies), denied him access to his personnel records, denied him equal access to public property (warned to "not set foot on the campus"), and seized his property (computer equipment). There has been no opinion or ruling on any of these and several other claims. They still await adjudication rather than defendants' evasion and judicial neglect.

At the same time defendants assert *res judicata*, they admit plaintiff makes 'new' constitutional claims [college brief, pages 18 and 20], adding however, that even these *new* constitutional claims are barred because they should have been raised while plaintiff was proceeding in the Florida judicial system. Plaintiff disputes that *res judicata* requires this *pro se* plaintiff being adjudicated by an *administrative* tribunal, to *explicitly* and *specifically* raise constitutional claims, and furthermore, disputes that any constitutional claims were indeed fully and fairly adjudicated, because there has been no identifiable opinion or ruling on any constitutional claim asserted by plaintiff to date in any prior proceeding. Florida state statutes prohibit its administrative tribunals from ruling on constitutional questions.

Assuming arguendo there was a 'Florida' judicial ruling on the 'federal' constitutionality of 'Florida' activities vis-à-vis the plaintiff, state courts are not the final arbiter of U.S. Constitutional questions. To hold otherwise would leave the U.S. Constitution subject to widely divergent interpretation and application throughout the states, undermining a fundamental reason for the existence of the national constitution itself.

The college-defendants argue plaintiff's claims meet "The four conditions which determine whether a claim is barred by *res judicata* in Florida courts": citing *Albrecht v. State*, 444 So.2d 8 (Fla. 1984) as an example of where those 4 conditions are described. Then apparently employing *Albrecht*, they assert plaintiff's claims present an identity of: (1) the thing sued for, (2) cause of action, and (3) parties. No 4th necessary condition of *res judicata* was asserted by the college-defendants—for whatever reason. An examination of *Albrecht* reveals the 4th condition to be an "identity of the quality in the person for or against whom the claim is made." As to all 4 conditions, there are no such identities in the instant case. In addition, plaintiff submits that *Albrecht* presumes other essential conditions of *res judicata* which were not at issue and therefore not discussed in *Albrecht*, *inter alia*, a final judgment on the merits by a court of competent jurisdiction.

A final judgment on the merits necessarily implies a *full and fair investigation*. There was none, by neither the college nor the Florida appellate court. Plaintiff-teacher was summarily banned from the public college campus, severely curtailing his preparation for the administrative hearing. He requested material public records which were denied him, not to mention a copy of his own personnel records. His lawyer unlawfully withdrew the day before the hearing, leaving the teacher a jumbled case file on his doorstep 15 minutes before the hearing. Plaintiff-teacher was denied a continuance in order to secure another lawyer or prepare to represent himself. None of his witnesses were summoned, and so forth. In short, Plaintiff was railroaded. There was no judgment on the merits with a full and fair investigation. The college president's recommendation to terminate this tenured teacher was rubber stamped by the board of trustees. He was Drum's entertainment.

In addition to there being no full and fair investigation, there are critical and complex issues to be resolved regarding the scope of competent jurisdiction. For example, only the college president, college, and teacher were statutorily authorized parties in the Florida record. Yet plaintiff names several other persons in the instant federal case (trustees, administrators, and attorneys). Defendants assert privity for those persons not named as parties to the prior litigation. Plaintiff however disputes an identity of *rights* and *risk* among these alleged privies, since they had no right to join the prior litiga-

tion, nor were they subject to any detrimental judicial remedy in the prior proceeding.

In addition to the question of who were parties (or privies) to the prior litigation, there is a temporal issue regarding jurisdiction. Plaintiff contends the college board of trustees lost its jurisdiction when it failed to render its final order within 90 days of the hearing, in accordance with Florida procedural statutes. If there is any *res judicata*, it applies to the charges and claims made against the teacher by the president of the college, which were by default null and void 90 days after the hearing. The fundamental principle under girding statutes of limitations and *res judicata* is brought to bear through the 90 day statute limiting how long a teacher in Florida may be subjected to litigation on a set of public charges.

In addition, both the college board of trustees and the Florida 3rd District Court of Appeal had *subject matter* jurisdictional limitations under Florida law, e.g. §120.57 Florida Statutes, which gave them no authority to rule on all constitutional, tort, and contract issues raised by plaintiff-teacher. The Florida appellate court affirmed *without opinion* the college decision to terminate plaintiff-teacher. The Florida appellate court discussed neither its subject matter jurisdiction nor the issues it was adjudicating. Just because plaintiff-teacher raises issues in federal court which he raised in Florida, doesn't necessarily mean those two tribunals had competent jurisdiction over and adjudicated those issues. What is properly barred by *res judicata* is an issue yet to be resolved. The bottom line on *res judicata* is that it is a question of fact (unless the proof admits of only one conclusion), and therefore it should go to the jury plaintiff has requested, prior to any review by this appellate court.

Closing

For the foregoing reasons, the district court's March 6, 1996 order should be not be affirmed. The record below reveals the district court abused its discretion when it: (1) dismissed plaintiff's complaint in part based on facts it dissembled regarding plaintiffs timely response to the order to show cause and on erroneous suppositions regarding his address, (2) failed to follow federal procedural rule allowing plaintiff to make "as many separate claims" as he had, and (3) failed to follow local federal procedural rule by calling hearings outside the county where the civil action arose, making it excessively burdensome for plaintiff to attend. "It is procedure," as Jus-

tice William O. Douglas, wrote, "that spells much of the difference between rule by law and rule by whim or caprice. The district court acted in a willful and unreasonable manner without proper consideration of facts and law. By definition its actions were arbitrary and capricious.

Attorney-defendants argue a "pro se plaintiff must abide by the rules governing the proper form of pleadings, whether a pro se plaintiff's complaint is properly drawn is a question for the district court." They cite *Procup v. Strickland* 760 F.2d 1107, 1115 (1th Cir. 1985) [attorney brief, pg. 13]. The penny hasn't dropped yet on defendants that a federal district court does not have unfettered discretion. Wherefore federal appellate courts? The very case they cite, *Procup* (another card in their house of cards), reveals upon more than the cursory inspection defendants apparently gave it, an appellate court admonishing a district court for shifting responsibility away from itself to review *pro se informa pauperis* pleadings, saying:

> the frustrations that may attend such violations of local rules cannot justify a proscriptive denial of constitutional rights. As federal courts, we must not surrender to a state-of-siege mentality and abandon our duty to provide a forum for even the abusive pro se litigant's occasional legitimate claim. The judicial time spent in dismissing such complaints and returning the exhibits is minimal at most and comprises a cost which our judicial system should absorb when the alternative ruling so portentously restricts the constitutional right of access to the courts. * * * If the claim is not facially frivolous and was not brought maliciously, the court need simply enter a one-line order instructing the defendants to show why the complaint is not entitled to the relief sought. If the claim is without merit, the defendants can easily answer, and then move for dismissal or summary judgment. * * * If the defendants' reply does not suffice to establish grounds for dismissal or summary judgment, the proceedings should continue as in an ordinary case. The claim would be precisely the sort that should be further developed and not be enjoined altogether.

"God offers to every mind its choice between truth and repose. Take which you please: you can never have both."

[Ralph Waldo Emerson (1803-1883)]. The U.S. District Court for the Southern District of Florida, chose *repose*.

Appellant-plaintiff knows he is sailing against the wind here. He opposes a federal district court and a multimillion dollar public college, each with a bevy of attorneys to defend themselves, and each having self-interests which squarely conflict with plaintiff's interests. They have presented a Herculean legal gauntlet for this *pro se in forma pauperis* plaintiff to overcome. His only weapon ... due process granted to him by the U.S. Constitution, and the deference this appellate court extends to it. The district court and defendants have skillfully employed the federal rules of civil procedure against this layman. However, procedural rules are a Delphic sword (double-edged). Plaintiff here asserts his federal procedural rights: (1) to have his claims individually assessed to determine if they provide fair notice of his claims and the grounds upon which they rest, and (2) to have proceedings conducted in Key West rather than Miami. "The history of liberty has largely been the history of the observance of procedural safeguards."— Felix Frankfurter. The power of a *pro se* layman is no match for the power of the government unless the individual has guarantees he will be treated fairly. Procedure is basically the community's assurance that prosecutors, judges and juries will behave properly. Plaintiff here simply pleads for steadfast adherence by the federal courts to the rule of law, and to the procedural safeguards promulgated by the U.S. Government in its Federal Rules of Civil Procedure.

Caught between wind and water (district court and defense attorneys), plaintiff seeks relief under the umbrella of this appellate court. Order the district court to draw in its horns. Order the defendants to answer his claims.

"The bird is in your hands, my son."
[Gerry Spence, 1996]

Mel Jenkins, *Pro se*, appellant.
PO Box 2525
Key West, FL 33045

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-4456
Non-Argument Calendar

D. C. Docket No. 95-10003-CIV-SH

MEL JENKINS,
Plaintiff-Appellant,

versus

FLORIDA KEYS COMMUNITY COLLEGE,
PATRICIA ALMEDA,
B.G. CARTER,
AARON CASTILLO, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(July 17, 1997)

Before ANDERSON, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

Appellant Mel Jenkins ("Jenkins") appeals the district court's judgment dismissing Jenkins's 500-page amended complaint without prejudice. The district court dismissed the initial complaint and granted Jenkins leave to amend the complaint to comply with the *Federal Rules of Civil Procedure* within twenty days, advising that the amended complaint should be composed of specific claims against specific defendants and warning him that failure to comply with the *Federal Rules of Civil Procedure* would result in a *sua sponte* dismissal of the action. Thereafter, Jenkins untimely filed a 500-

page amended complaint. The district court, *sua sponte*, scheduled a hearing to show cause as to why Jenkins's amended complaint should not be dismissed for failure to comply with Fed. R. Civ. P. 8(a), mailing notice to all parties at their addresses of record. Jenkins failed to appear or even attempt to reschedule the hearing.

The district court then issued an order to Jenkins to show cause why the court should not dismiss the case and issue sanctions for his failure to appear. Jenkins responded in an untimely manner, asserting that he had never received notice of the hearing because of a change of address. Subsequently, the district court rescheduled the hearing but once again, Jenkins failed to appear. A magistrate judge then recommended the case be dismissed without prejudice, stating that Jenkins repeatedly failed to comply with orders of the court, that there was a lack of prosecution of the case, and that the complaint failed to comply with Rule 8(a). The district court adopted the report and recommendation of the magistrate judge and dismissed the complaint without prejudice.

The district court may dismiss an action pursuant to Fed. R. Civ. P. 41(b) if a plaintiff fails to comply with Fed. R. Civ. P. 8. Pelletier v. Zweifel, 921 F.2d 1465, 1522 n. 103 (11th Cir.), cert. denied: 502 U.S. 8SS (1991). A district court also has authority under Rule 41(b) to dismiss an action for failure to prosecute or to obey a court order. Goforth v. Owens, 766 F.2d 1533, 1535 (11th Cir. 1985). The district court's power to dismiss is an inherent aspect of its authority to enforce its orders and insure prompt disposition of lawsuits. Id. We review a Rule 41(b) dismissal without prejudice for abuse of discretion. Dynes v. Army Air Force Exch. Serv., 720 F.2d 1495, 1499 (11th Cir.1983).

Justice does not require a district judge to sort through numerous pages of irrational, prolix, redundant pleadings, because it would undermine the purpose of Rule 8. See Gordon v. Green, 602 F.2d 743, 745 (5th Cir. 1979), cert. denied, 459 U.S. 1203 (1983).[16] In reviewing the record in this case, we observe that Jenkins has attempted to assert over 100 claims for relief against seventeen defendants. Moreover, the amended 500-page complaint is clearly redundant, irrational,

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[16] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent the decisions of the former Fifth Circuit issued before October 1, 1981

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On Appeal from the United States District Court
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Before ANDERSON, DUBINA and BLACK, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED.

Entered: July 17, 1997
For the Court: Miguel J. Cortez, Clerk

By: (Matt L. Davidson)
Deputy Clerk

ISSUED AS MANDATE: 8/18/97